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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1914

No. [illegible] 103

JOHN H. SHELLENBARGER, PLAINTIFF IN ERROR,

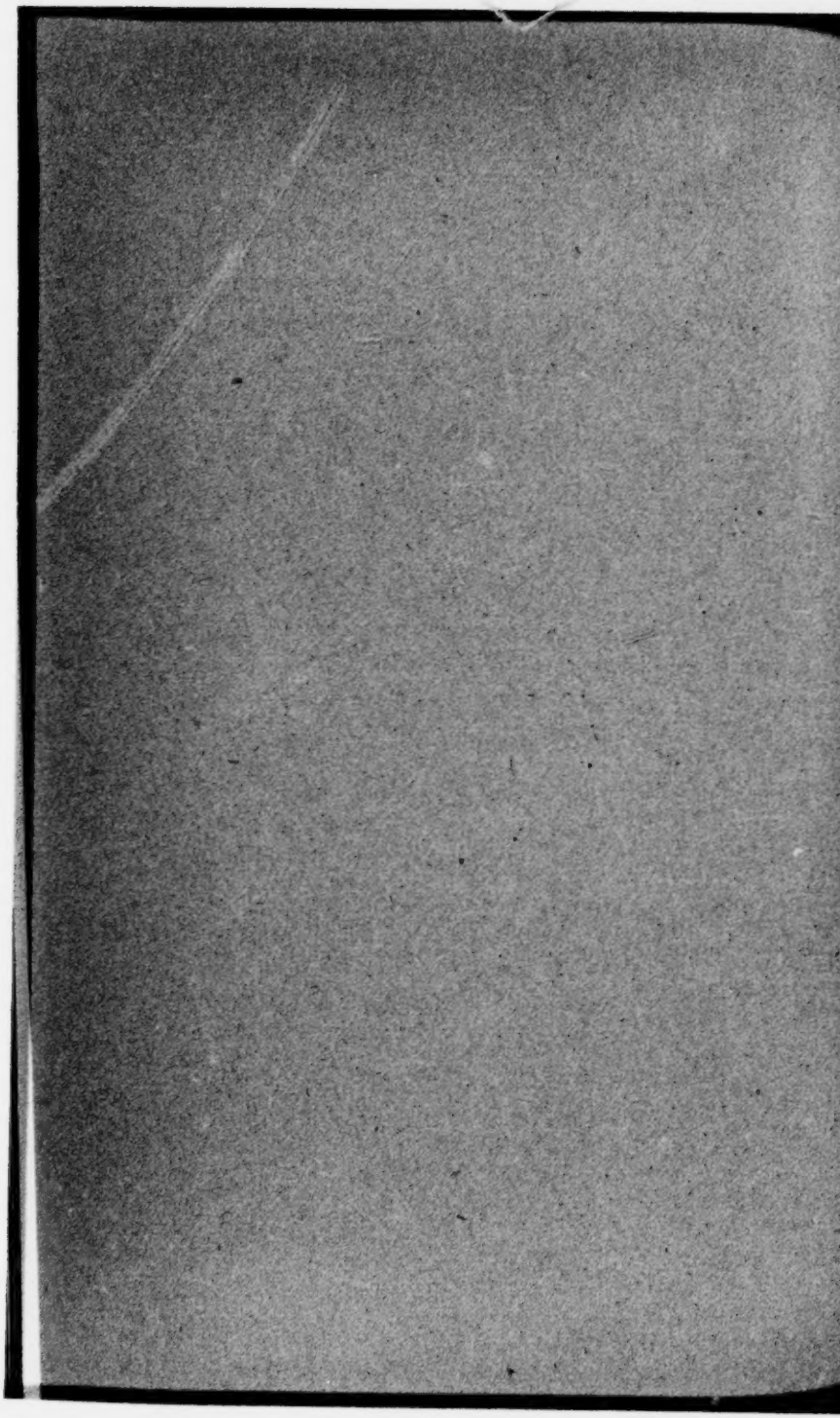
vs.

WILLIAM M. FEWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED JANUARY 16, 1913.

(23,512)



(23,512)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 434.

JOHN H. SHELLENBARGER, PLAINTIFF IN ERROR,

vs.

WILLIAM M. FEWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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1 *Return to Writ.*

STATE OF OKLAHOMA,
Supreme Court:

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto set my hand and affix the seal of said court, at Oklahoma City, this 8th day of January, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

2 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to William M. Fewell, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Oklahoma, wherein John H. Shellenbarger is designated as plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oklahoma this 19th day of December, A. D. 1912.

JOHN B. TURNER,
Chief Justice of the Supreme Court of Oklahoma.

[Seal Supreme Court, State of Oklahoma.]

Attest:
W. H. L. CAMPBELL,
Clerk of the Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

CITY OF TULSA,
County of Tulsa, State of Oklahoma:

I, the undersigned attorney of record for the defendant in error of the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in error

in the Supreme Court of the United States. Dated this 20th day of December, 1912.

HENRY B. MARTIN,
Attorney for Defendant in Error.

3 [Endorsed:] No. 1681. John H. Shellenbarger, Plaintiff in Error, v. William M. Fewell, Defendant in Error. Citation. William R. Lawrence, Attorney at Law, Muskogee, Okla. Filed Dec. 21, 1912. W. H. L. Campbell, Clerk.

4 In the Supreme Court of the State of Oklahoma.

No. —.

JOHN H. SHELLENBARGER, Plaintiff in Error,
v.
WILLIAM M. FEWELL, Defendant in Error.

Petition for Writ of Error.

Comes now the above named plaintiff in error and says that on the 19th day of March, 1912, judgment in this cause was entered by this Court against John H. Shellenbarger, plaintiff in error, and thereafter a petition for rehearing was filed, presented, considered, and on the 4th day of June, 1912, denied by this Court, whereupon said judgment became final; that said John H. Shellenbarger, Plaintiff in error, was and is aggrieved in that, in said judgment and proceedings had prior thereto in this case, certain errors were committed to his prejudice; that this is an action brought under the statutes of the United States relating to the control, disposition and allotment of the public lands of the Muscogee or Creek Tribe of Indians of the late Indian Territory, and the descent of the same, where a citizen of that tribe duly enrolled and entitled to allotment, died before receiving the same, and the right of the defendant in error, herein to acquire right of possession, to the track of land in dispute being the same allotted to the heirs of said deced-
5 ent, without further or other description or designation under and by means of a deed of conveyance executed to him by the husband of the deceased, who, being a non-citizen of said tribe, and the said deceased being a citizen thereof, of Indian blood of said tribe, and said husband claiming to be the nearest of kin of said deceased, surviving her, and by reason thereof her sole heir at law and entitled to have and hold the absolute title thereto under the said law of descent thereby drawing in question the construction of certain statutes and laws of the United States relating to said descent of said public lands so allotted and which this court has construed in favor of the inheritance of said land being in the husband, by and through whom, by virtue of said deed of conveyance this defendant in error is entitled to have and to hold the immediate possession of said land as against the possession of this plaintiff in

error, who claims the right of possession under a like deed of conveyance executed to him by the maternal sister of said deceased an enrolled citizen of said Creek Nation of Creek Indian blood, and nearest of kin to said deceased of said blood, all of which will more fully appear in detail from the assignment of errors herein.

Wherefore said plaintiff in error prays a writ of error may issue to the Supreme Court of the State of Oklahoma for the correcting of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

WILLIAM R. LAWRENCE,
Att'y for Plaintiff in Error.

6 [Endorsed:] No. 1681. John H. Shellenbarger, Plaintiff in Error, vs. William M. Fewell, Defendant in Error. Petition for writ of error. William R. Lawrence, Attorney at Law, Muskogee, Okla. Filed Dec. 19, 1912. W. L. L. Campbell, Clerk.

7 In the Supreme Court of the United States.

No. 1681.

JOHN H. SHELLENBARGER, Plaintiff in Error,
vs.
WILLIAM M. FEWELL, Defendant in Error.

Assignment of Error on Writ of Error to State Court.

Comes now the plaintiff in error in the above entitled cause, and shows and avers that in the record and proceedings in said cause, the Supreme Court of the State of Oklahoma erred to the grievous injury and wrong of the plaintiff in error herein to the prejudice and against the rights of the said plaintiff in the following particulars:

First. The said Supreme Court erred in holding and adjudging, under the agreed statement of facts in said cause, the evidence appearing in the record, undisputed, and the statute and laws of the United States relating to the allotment in severalty of the public lands of the Muskogee or Creek Tribe of Indians, in the late Indian Territory, among the enrolled members of that tribe, and the descent of the same in certain cases, as provided by an act of Congress entitled "An act to ratify and confirm an agreement with the Creek Tribe of Indians" (31 S. L. 861), and particularly set forth in Section 28 thereof, that said defendant in error had and held the legal right to the immediate possession of the 160 acres of land in controversy in this cause, and should have writ of possession therefor, under and by virtue of a deed of conveyance executed to him by the surviving husband of a deceased member and citizen of said tribe, duly enrolled as such and entitled to an allotment
8 of 160 acres of land out of the public lands of said Nation in said Territory and being of the blood of said tribe, who was

living on April 1, 1899, and who died since that time, without having received her allotment of land and distribution of all the funds of the said tribe, to which she would be entitled if living, and which was afterwards allotted to the heirs of said deceased, without further description, as provided by said act of Congress, and being the land in controversy herein, and the said husband claiming to be the sole heir at law of said deceased, surviving, and thereby the owner in fee of said named land, though conceded and expressly shown by said agreed statement of facts, and the undisputed evidence in the record herein, that he was a non-citizen of said tribe of Indians, at the death of his said wife was not a member thereof and not entitled to enrollment as such, and so enrolled, as against the actual possession of said land by the said plaintiff in error claiming the legal right thereto under and by deed of conveyance executed to him, long prior to the execution of said deed to defendant in error, as aforesaid, by a sister nearest of kin to said deceased, surviving her, and of the same degree of blood of said tribe of Indians and a citizen and member of said tribe, as set forth and stated in the said agreed statement of facts, and undisputed evidence in the record herein contained.

Second. Said Supreme Court erred in not reversing the judgment of the Trial Court in this cause, and in not giving plaintiff in error his rights under the statute and laws of the United States as the legal and bona fide in fee of said described land.

Wherefore, for these and other manifest errors appearing on the face of the record, the said John H. Shallenbarger, plaintiff in error prays that the judgment of the Supreme Court of the State
9 of Oklahoma be reversed, and set aside and held for naught, and that judgment be reversed for plaintiff granting him his rights under the statutes and laws of the United States, and that he also have judgment for his costs.

WILLIAM R. LAWRENCE,
Attorney for Plaintiff in Error.

10 [Endorsed:] No. 1681. John H. Shellenbarger, Plaintiff in Error, v. William M. Fewell, *Plaintiff* in Error. Assignment of Errors on writ of Error to State Court. William R. Lawrence, Attorney at Law, Muskogee, Okla. Filed Dec. 19, 1912. W. H. L. Campbell, Clerk.

11 In the Supreme Court of the State of Oklahoma.

No. —.

JOHN H. SHELLENBARGER, Plaintiff in Error,
vs.
WILLIAM M. FEWELL, Defendant in Error.

Allowance of Writ.

Comes now John H. Shellenbarger, plaintiff in error, above named, on this 19th day of December, A. D. 1912, and files and presents to

this court his petition, praying for the allowance of a writ of error intended to be urged by him; and praying further, that a duly authenticated transcript of the records, proceedings and papers, upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions therein presented.

It is ordered by this Court that a writ of error be allowed, as prayed: Provided, however, that the said John H. Shellenbarger, plaintiff in error, give bond, according to law, in the sum of One Thousand Five Hundred $1,500.00 Dollars which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 19th day of December, A. D. 1912.

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
W. H. L. CAMPBELL, *Clerk.*
By JESSIE PARDOE, *Deputy.* [SEAL.]

No. 1681. John H. Shellenbarger, Plaintiff in Error, vs. William M. Fewell, Defendant in error. Allowance of Writ of Error. Filed Dec. 19, 1912. W. H. L. Campbell, Clerk.

12 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable *of* the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Oklahoma, before you at the March sitting of the —— Term, 1912, between John H. Shellenbarger, plaintiff in error, versus William M. Fewell, defendant in error, a manifest error has happened to the great damage of the said plaintiff in error, as by his petition appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record — proceedings aforesaid at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before thirty days from the date hereof to the end: that the records and proceedings aforesaid being inspected,

the United States Supreme Court may cause further to be done thereon to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 20th day of December, 1912.

Done in the City of Muskogee, with the seal of the District Court of the United States for the Eastern District of Oklahoma.

[Seal of the United States District Court, Eastern District of Oklahoma.]

13 R. P. HARRISON,
Clerk District Court United States,
District of Oklahoma.

Allowed:
JOHN B. TURNER,
Chief Justice of the Supreme Court
of the State of Oklahoma.

In the Supreme Court of Oklahoma.

JOHN H. SHELLENBARGER
vs.
WILLIAM M. FEWELL.

I, W. H. L. Campbell, Clerk of the Supreme Court of Oklahoma, do hereby certify that on the 21" day of December, 1912, a copy of the foregoing writ of error for the defendant in error was lodged in my office at Oklahoma City, Oklahoma.

Witness my hand and the seal of said Court this 21" day of December, 1912.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court,
By JESSIE PARDOE, *Deputy.*

14 [Endorsed:] No. 1681. John H. Shellenbarger, Plaintiff in Error, vs. William M. Fewell, Defendant in Error. Writ of Error. William R. Lawrence, Attorney at Law, Muskogee, Okla. Filed Dec. 21, 1912. W. H. L. Campbell, Clerk.

15 In the Supreme Court of the United States.

No. —.

JOHN H. SHELLENBARGER, Plaintiff in Error,
vs.
WILLIAM M. FEWELL, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents: That we, John H. Shellenbarger of the County of Tulsa, State of Oklahoma, as principal, and Claud Sample, C. B. Haikey and C. W. Baker of the County of Tulsa, State of Oklahoma, as sureties, are held and firmly bound unto the above named William M. Fewell, in the sum of Fifteen Hundred Dollars ($1,500.00), to be paid to him, and for the payment of which, well and truly to be made, we bind ourselves, and each of us, our, and each of our, heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the — day of September, in the year of our Lord, One Thousand Nine Hundred and Twelve.

Whereas, the above named John H. Shellenbarger, plaintiff in error, seeks to prosecute his writ of error in the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma.

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his writ of error to effect, and answer all cost and damages that may be adjudged if *they* shall fail to make good *their* plea; then this obligation to be void, otherwise to remain in full force and virtue.

J. H. SHELLENBARGER.
C. B. HAIKEY.
CLAUDE SAMPLE.
C. W. BAKER.

16 STATE OF OKLAHOMA,
Tulsa County, ss:

Claude Sample, C. B. Haikey, and C. W. Bakers whose names are subscribed as surety to the above bond, being severally and duly sworn, each for himself says: That he is a resident and freeholder of the State of Oklahoma and is worth more than the sum in the said bond specified as the penalty thereof, over and above all his just debts and liabilities, in property, not by law exempt from execution in this state.

CLAUDE SAMPLE.
C. B. HAIKEY.
C. W. BAKERS.

Personally approved.
CLAUDE SAMPLE AND
C. W. BAKERS.

Subscribed and sworn to before me this 11th day of September, 1912.

[SEAL.] C. LIPSCOMB,
Notary Public.

My commission expires March 22, 1915.

This bond approved this 19th day of December, A. D. 1912.

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

COUNTY OF TULSA,
State of Oklahoma:

Personally approved.
C. B. HAIKEY.

Subscribed & sworn to before me this 12th day of Sep., 1912.

[SEAL.] HERCHEL B. HAMILTON,
Notary Public.

My com. exp. Mar. 31, 1914.

Endorsed on back: 1681. Shellenbarger, Pl'ff in Error, vs. Fewell, Def't in Error. Bond on Writ of Error. Filed Dec. 19, 1912. W. H. L. Campbell, Clerk.

17 Filed May 12, 1910. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

1681.

JOHN H. SHELLENBARGER, Plaintiff in Error,
vs.
WILLIAM M. FEWEL, Defendant in Error.

From District Court of Tulsa County, Oklahoma.

Petition in Error.

Paintiff in error complains of said defendant in error, in this that said defendant, at the April Term, 1909, of said District Court, recovered judgment against this defendant in a certain action in said court wherein this plaintiff was there defendant, and this defendant was there plaintiff. A certified transcript of the record of said action therein, and as well of the original case made, duly certified, is attached hereto and made a part of this petition in error, and said plaintiff avers that there is error in said proceedings, in this:

(1) Error of the Court in denying the petition of this plaintiff for

an order for the removal of said action from said District
18 Court, to the Circuit Court of the United States, for the Eastern District of Oklahoma, on the ground, therein alleged, that the matter in dispute, was whether or not, one Phœbe B. Trusler, this plaintiff's grantor of the land claimed by this defendant in said action, being the sole question at issue in said action, who was an admitted citizen of the Creek Nation of Indians, took said land by inheritance, as such Creek citizen, under the second clause of section 28 of an Act of Congress of the United States, approved March 1, 1901, entitled "an act to ratify and confirm an agreement with the Muscogee or Creek Tribe of Indians, and for other purposes;" or whether or not this defendant's grantor, George A. Solander, an admitted non-citizen of said Nation of Indians, took said land by inheritance under said Act of Congress; thereby raising solely a Federal question, for the consideration of the Court, and fully and completely within the jurisdiction of said Circuit Court of the United States, and which petition was denied by said District Court solely upon the ground, as herein appearing, from the record of the judgment of said Court: "For the reason that said petition does not present for determination a Federal question;" to which action of the Court this plaintiff then and there duly excepted.

(2) Error of the Court in overruling the demurrer of this plaintiff to this defendant's petition, to which action of the court this plaintiff then and there duly excepted.

(3) Error of the Court in finding that "the Creek Nation had recognized the rights of the white people who had intermarried among them, though it was never understood by the Creek
19 law makers that the intermarried white man should share in the distribution of the lands of the tribe;" and the further finding by the court that "Congress saw that it was impossible for the conditions that then existed in the Five Civilized Tribes to longer continue and consequently certain agreements were made with them for the purpose of allotting the lands in severalty, and at which time it was agreed that the tribal government should cease, and that the Indian Territory should become a part of the United States, and the members of the said Tribes should become citizens of the U. S. The purpose on the part of Congress was to destroy, as far as possible, the distinction that had formerly existed between citizens of the United States and the citizens of the Five Civilized Tribes."

(4) Error of the Court in finding that "the Creek law at the time of the death of Minnie Solander was to the effect, that her allotment went to her husband, George Solander, and child Hettie L. Solander, whether by descent or purchase it is not necessary to decide."

(5) Error of the Court in further finding "that the interests of George and Hettie Solander relate back to the time of the death of Minnie Solander, and their rights and title to her allotment of the lands vested at that time."

(6) Error of the Court in finding that upon the death of Hettie Solander, the father being her nearest of kin took her title.

To all of which findings this plaintiff then and there excepted.

(7) Error of the Court in overruling this plaintiff's motion for new trial.

20 (8) Error of the Court in adjudging that this defendant in error was and is the owner in fee of the premises described in his petition herein and that he have and recover possession of the same, and for costs and that he have execution therefor. To which judgment this plaintiff then and there duly excepted.

Wherefore the plaintiff in error prays that said judgment so rendered may be reversed, and a judgment rendered in favor of the plaintiff in error and against the defendant in error, upon the pleadings, agreed statement of facts, the evidence and the law, and for such other relief as may to the Court seem just.

JOHN H. SHELLENBARGER,
Plaintiff in Error,
By His Attorney, WILLIAM R. LAWRENCE.

21 Filed Aug. 21, 1909. W. W. Stuckey, Clerk District Court.

STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court in and for Tulsa County, State of Oklahoma.

No. 898.

WILLIAM M. FEWEL, Plaintiff,
vs.
PHŒBE B. TRUSLER, FRANK TRUSLER, and JOHN H. SHELLENBARGER, Defendants.

Be it remembered that heretofore, to-wit, on the 13th day of July, 1908, said plaintiff, William M. Fewel, commenced this action against said defendants by filing in the District Court within and for Tulsa County, State of Oklahoma, his petition, which was in words and figures following:

STATE OF OKLAHOMA,
County of Tulsa, ss:

In the District Court, Tulsa County, September Term, 1908.

WM. M. FEWEL, Plaintiff,
vs.
PHŒBE B. TRUSLER & FRANK TRUSLER, JOHN H. SHELLENBARGER, Defendants.

Petition.

Plaintiff states that Minnie Solander was a Creek citizen
22 by blood of the Creek Nation of Indians; that she died intestate on the 8th day of October, 1899, leaving surviving

her her lawful and acknowledged husband, George A. Solander, who was then and there a non-citizen of the Creek Nation of Indians, and also leaving surviving her one child, a daughter, Hettie L. Solander, who was then and there a citizen of the Creek Nation of Indians and was enrolled as a mixed blood Indian; that the said Hettie L. Solander was born of the body of the said Minnie Solander and George A. Solander, and was the sole and only child of the said Minnie Solander and George A. Solander at the time of the death of the said Minnie Solander.

Plaintiff further states that the said husband, George A. Solander, and the said Hettie L. Solander *was* the only and sole heirs at law of the said Minnie Solander, deceased, and as such heirs succeeded in equal parts, each a moiety, to all of the rights and property of the said Minnie Solander, in and to the lands and the funds of the Creek Nation of Indians.

Plaintiff further states that the said Hettie L. Solander died intestate and without issue on or about the 19th day of December, 1899, leaving no husband nor children surviving her and leaving surviving as her sole and only heir at law and nearest relation and kin, her Father George A. Solander, and as such nearest kin, and only heir at law of the said Hettie L. Solander, the said George A. Solander inherited and succeeded to all the rights and property of the said Hettie L. Solander, deceased, so inherited by the said Hettie L. Solander, from her mother, Minnie Solander, in and to the lands and funds of the Creek Nation of Indians.

Plaintiff further states that afterwards the said George A. Solander, selected and had the Commissioners to the Five Civilized Tribes allot to the heirs of the said Minnie Solander, one hundred and sixty acres (160) of land, a portion of which is described as follows, to-wit:

23 The South half of the Southeast quarter of Section Two, Township 17 North, Range 13 East, in Tulsa County and State of Oklahoma.

That the Principal Chief of the Creek Nation of Indians, with the approval of the Secretary of the Interior, issued an allotment deed or patent for said land in the name of the heirs of the said Minnie Solander, deceased. That the said George A. Solander, by reason of being the lawful- acknowledged husband of Minnie Solander, succeeded to one half of all the rights and property of the said Minnie Solander, deceased, in and to the lands and funds of the Creek Nation of Indians. That Hettie L. Solander, by reason of being the only child of the said Minnie Solander, succeeded to the other one half of all the rights and property of the said Minnie Solander, in and to the lands and funds of the Creek Nation of Indians.

That George Solander, by reason of being the father and nearest relation and kin to the said Hettie L. Solander, deceased, did, upon the death of the said Hettie L. Solander, inherit of the said Hettie L. Solander, as her only and sole heir at law, all of the rights and property of the said Hettie L. Solander, so inherited by the said Hettie L. Solander, from her mother, Minnie Solander, in and to

the lands and funds of the Creek Nation of Indians, and as such heir of the said Minnie Solander, and the said Hettie L. Solander, the said George A. Solander, became the sole owner of the entire title in fee simple, absolute of the above described land.

That on the 27th day of April, 1906, the said George A. Solander by warranty deed duly executed, acknowledged and delivered, a copy of which is hereto attached and marked Exhibit "A" and made a part hereof, for valuable consideration, granted, sold, conveyed and delivered to the plaintiff the above described real estate to-

24 wit: The south half of the southeast quarter of section two, township 17 north, range 13 east, in Tulsa County and State of Oklahoma. That said deed was filed for record April 27th, 1906, and duly recorded in book 14 at page 106 of deed records for the 28th recording district for Indian Territory at Sapulpa.

Plaintiff further states that he is now the owner in fee simple, absolute of the said above described real estate, and entitled to the immediate possession of said land.

Plaintiff further states that one Phœbe B. Trusler, claims to be a sister of the said Minnie Solander, and that by reason of being a sister of the said Minnie Solander, deceased, she claims to be the only heir at law of the said Minnie Solander and the said Hettie L. Solander, and falsely claiming to be the owner *of* in fee simple of the land herein described, and joined by her husband, Frank Trusler, did, on August 15th, 1906, by warranty deed, executed and acknowledged and delivered, convey said land to the defendant, John H. Shellenbarger, which said deed was duly recorded in book 6 at page 5 of the Western Judicial District at Tulsa, a copy of which is hereto attached and marked Exhibit "B" and made a part of this petition.

Plaintiff further states that said deed is a cloud on his said land and tends to depreciate the value of said land and the plaintiff's said title, and that plaintiff is entitled to have said cloud removed and said deed cancelled, and that the said Phœbe B. Trusler, and her husband, Frank Trusler, and the said John H. Shellenbarger, the defendant-, *is* claiming some rights and title in and to said land, adverse to plaintiff.

Plaintiff further states that the defendant, John H. Shellenbarger, is now in possession of said above described land, adverse to plaintiff, and wrongfully and unlawfully withholding said possession against the will and consent of plaintiff; that plaintiff has demanded of defendant, possession of said premises but the said defendant has

25 failed and refused to give plaintiff possession of said land. Wherefore plaintiff prays the court to adjudge and decree the plaintiff to be the owner in fee simple absolute of the land, and that the defendants, Phœbe B. Trusler, Frank Trusler and John H. Shellenbarger, their heirs, and each of them be declared to have no right, title or interest in and to any of said lands, and that they, their heirs, administrators, executors or assigns be forever barred from setting up or maintaining any action for said land and that said deed executed and delivered by the said Phœbe

B. Trusler, and her husband Frank Trusler, to the defendant, John H. Shellenbarger, aforesaid, be declared null and void, and be delivered up to this court to be cancelled and that the title of plaintiff in and to said lands be quieted against all the claims and demands of the defendants, John H. Shellenbarger, Phebe B. Trusler, and Frank Trusler, and that the plaintiff have immediate possession of said lands and that the defendants be ejected therefrom. And that the plaintiff have judgment for his costs and for equitable and proper relief as to your Honor may seem proper.

WM. FEWEL,
By J. J. HENDERSON, *Att'y.*

STATE OF OKLAHOMA,
County of Tulsa, ss:

Wm. M. Fewel, being duly sworn says that he is the plaintiff in this action, that the allegations and things set out in the above petition are true to his best knowledge and belief.

WILLIAM M. FEWEL.

Subscribed and sworn to before me this 13 day of July, 1908.
[SEAL.] W. W. STUCKEY,
Clerk Dist. Ct.

26 "EXHIBIT A."

Warranty Deed with Relinquishment of Dower.

Know all men by these presents:

That I, George A. Solander a single man, for and in consideration of the sum of Four Thousand ($4,000.00) Dollars, to me paid cash in hand, receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said William M. Fewel, and unto — heirs and assigns forever, the following lands lying in the Creek Nation Western District of the Indian Territory, to-wit:

All of the S. E. ¼ of Section 30, Twp. 19 north, Range 13 east, the same being the allotment of my deceased daughter, Hettie L. Solander, who died February, 1900, and all of the N. ½ of the N. W. ¼ and all of the S. ½ of the S. E. ¼ of Section 2, Twp. 17 North, Range 13 East, the same being the allotment of my deceased wife, Minnie Solander, who died several months prior to the death of our daughter, Hettie L., *they* being 320 acres more or less.

To have and to hold the same unto the said William M. Fewel and unto his heirs and assigns forever, with all the appurtenances thereunto belonging.

And hereby covenant with said William M. Fewel that I will forever warrant and defend the title of said lands against all claims whatever, and I further declare that I am the sole heir and survivor of my family.

Witness our hands and seal this 27th day of April, 1906.

GEORGE SOLANDER. [L. S.]

Acknowledgement.

INDIAN TERRITORY,
Western District:

Be it remembered, that on this day came before me the undersigned a Notary Public within and for the Western District of the Indian Territory aforesaid, duly commissioned and acting, George A. Solander, to me known as the grantor in the foregoing deed, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth.

Witness my hand and seal as such Notary Public, on this 27 day of April, 1906.

[SEAL.] W. A. COOK,
Notary Public.

My commission expires July 8, 1906.

INDIAN TERRITORY,
Western District, at Sapulpa, Ind. Ter.:

I hereby certify that this instrument was filed for record in my office on April 27th, 1906, at 1 o'clock P. M. and duly recorded in record 14, page 106.

____ ____,
Deputy Clerk and ex-Officio Recorder.

27 "EXHIBIT B."

General Warranty Deed.

This indenture made and entered into this 15th day of August, one thousand nine hundred and six by and between Phœbe B. Trusler, and Frank Trusler, of Fry, part-*y* of the first part, and John H. Schelienbarger of Fry, party of the second part,

Witnesseth: That the said part-*y* of the first part, for and in consideration of the sum of fifteen hundred dollars, in hand paid, the receipt of which is hereby acknowledged, do*es* hereby grant, bargain, sell, convey and confirm unto the said party of the second part, the following described real estate and premises situated in the Creek Nation, and within the limits of the Indian Territory, to-wit:

The south half of the Southeast quarter of section two (2), township seventeen (17) north, range thirteen (13) east. Together with all the improvements thereon and the appurtenances and immunities thereunto belonging or in any wise appertaining, and warrant the title to the same.

And I, Phœbe B. Trusler, wife of the said Frank Trusler, for and in consideration of the said sum of money, do hereby release and relinquish unto the said party of the second part all my rights of dower and homestead in and to said lands.

To have and to hold the said lands unto the said party of the second part, his heirs, executors, administrators and assigns, forever.

In witness whereof, the said part-*y* of the first part *has* hereunto set their hands and seals the day and year first above written.

Witnesses:
HOMER C. HUGHES as to PHOEBE B. TRUSLER. [SEAL.]
W. C. HUGHES as to FRANK TRUSLER. [SEAL.]
W. P. HUGHES.

UNITED STATES OF AMERICA,
Indian Territory, Western Judicial District, ss:

Be it remembered that on this day came before me, the undersigned, a Notary Public, within and for the Western Judicial District of Indian Territory aforesaid, duly commissioned and acting as such, Frank Trusler, to me personally well known as one of the parties grantors in the within and foregoing deed of conveyance, and stated that he executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify; and I further certify that on this day also voluntarily appeared before me the said Phœbe B. Trusler, wife of said Frank
28 Trusler, to me personally well known to be the person whose name appears upon the within and foregoing deed of conveyance, and in the absence of her said husband, declared that she had of her own free will executed said deed and signed and sealed the relinquishment of dower and homestead therein expressed, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

Witness my hand and seal as such Notary Public on this 15th day of August, 1906.

[SEAL.] WILLARD M. McCULLOUGH,
Notary Public.

Western Dist., Ind. Ter.
My commission expires March 21st, 1908.

Filed for record Aug. 15th, 1906, at 1 o'clock P. M. Otis Lorton, Deputy Clerk and ex-Officio Recorder, in Book 6, page 5.

(Endorsed on back:) No. 898. Wm. M. Fewel vs. Phœbe B. Trusler, Frank Trusler, & John H. Schellenbarger. Petition. 21st Judicial Dist., Tulsa Co., Okla. Filed Jul- 13, 1908. W. W. Stuckey, Clerk District Court.

29 And thereupon, on said 13th day of July, 1908, a summons was issued in said cause against said defendants, which summons is in words and figures following:

Summons.

STATE OF OKLAHOMA,
Tulsa County:

No. 898.

WILLIAM M. FEWELL, Plaintiff,
vs.
PHŒBE B. TRUSLER et al., Defendants.

To State of Oklahoma to the Sheriff of Tulsa County, Greeting:

You are hereby commanded to notify Phœbe B. Trusler, Frank Trusler, and John H. Schellenbarger, that they have been sued by Wm. M. Fewel for Cancellation of deed and for possession of land and to quiet title in the District Court of Tulsa County, Oklahoma, and that they must answer the petition of said Wm. M. Fewel filed against them in said Court, in the City of Tulsa, in said County, on or before the 12th day of August, 1908, or said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 23rd day of July, A. D. 1908.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Tulsa in said County this 13th day of July, A. D. 1908.

[Seal Clerk District Court, Tulsa County, Oklahoma.]

W. W. STUCKEY, *Clerk.*
By J. A. LASWELL, *Deputy.*

Suit brought for cancellation of deed and for possession of land. If the defendant fail to answer plaintiff will take judgment for the sum of $— with interest thereon at the rate of — per cent per annum from the — day of ——, 19—, and cost of suit.

W. W. STUCKEY,
District Clerk.
By J. A. LASWELL, *Deputy.*

Sheriff's Return.

STATE OF OKLAHOMA,
Tulsa County, ss:

Received this writ July 13th, 1908, at — o'clock — M., and served the same upon the following persons, defendants within named at the times following, to-wit:

John H. Schellenbarger, July 20th, 1908, by delivering to said defendant personally, in said County, a true and certified copy of the within summons, with all the endorsements thereon.

The following persons, defendants within named, not found in said County: Phœbe Trusler and Frank Trusler.

LON LEWIS, *Sheriff*,
By C. E. PAGE, *Deputy*.

Sheriff's Fees.

Service and return first person	$.50
3 copies summons	$.75
Mil-age 22 miles	$2.20
Not found 2	.10
Total	$3.55

Endorsed: No. 898. App. Docket 1, page 298. In District Court. Summons. Wm. M. Fewel vs. Phœbe N. Tresler et al. Issued July 13, 1908. Returnable July 23, 1908. Ans. Due Aug. 12, 1908. J. J. Henderson, Attorney for Plaintiff. *Filed*. 21st Judicial Dist., Tulsa Co., Okla. Filed Jul- 23, 1908. W. W. Stuckey, Clerk District Court.

31 And thereafter, to-wit, on the 11th day of August, 1908, said defendant, John H. Shellenbarger, filed his petition and bond for the removal of said cause to the United States Circuit Court for the Eastern District of Oklahoma; which petition and bond are in words and figures following:

In the District Court of Tulsa County, State of Oklahoma.

No. 898.

WILLIAM M. FEWEL, Plaintiff,
vs.
PHŒBE B. TRUSLER, FRANK TRUSLER, and JOHN H. SHELLENBARGER, Defendants.

Petition of Defendant Shellenbarger for Removal of Cause to United States Circuit Court.

The said defendant, Shellenbarger, by this his petition for removal of cause, states that the above named action is a suit of a civil nature, at law, pending in said State Court; that he has been personally served with summons therein which commands him to appear and answer or plead thereto by August 12th, 1908, and that he has not appeared thereto otherwise than by filing this petition for removal.

The petitioner's ground for removal is that the sole matter in dispute arises under an Act of Congress of the United States, entitled "An Act to ratify and confirm an agreement with the Muscogee or Creek Tribe of Indians, and for other purposes," approved March

1, 1901; the second clause of the 28th section of which provides: "All citizens who were living on the first day of April, 1899, entitled to be enrolled under Section 21 of the Act of Congress approved June 28, 1898, entitled, "An Act for the protection of the people of the Indian Territory, and for other purposes," shall be placed on the rolls to be made by said Commission, under said Act of Congress, and if any such citizen has died since that time, or may hereafter die before receiving his allotment of lands and dis-
32 tributive share of all the funds of the tribe, the lands or funds to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

Petitioner further states, that the said law of descent and distribution, aforesaid, of the Creek Nation is in the words and figures as follows:

"SEC. 267. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no children, and a child's part if there should be children, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner."

And said Creek Statute further provides:

"SEC. 299. No non-citizen shall on account of marriage with a citizen of this Nation, acquire any right pertaining or belonging to a citizen of this Nation," approved October —, 1892, as appears by the statutes of said Nation published by authority thereof in 1893 and commonly known as "McKellop's Statutes of the Creek Nation."

The petition of said plaintiff herein alleges and sets forth, that one "Minnie Solander was a Creek citizen by blood of the Creek Nation of Indians, that she died intestate on the 8th day of October, 1899, leaving her surviving her lawful and acknowledged husband George Solander, who was then and there a non-citizen of the Creek Nation of Indians, and also leaving her surviving one child, a daughter, Hettie L. Solander, —— ½; that she was born of the body of said wife Minnie and her said husband, and was the sole and only child of said Minnie and George Solander, and that said father and child were the only heirs of said Minnie, and as such heirs they succeeded in equal parts to all the rights, land and property of said Minnie. The said Hettie died intestate without issue, December 19, 1899, leaving no husband nor children surviving, and leaving surviving her as her sole and only heir at law the said father
33 who succeeded to the rights and property of said Hettie

That afterwards said George Solander selected and had the Commissioners of the Five Civilized Tribes allot to the heirs of said Minnie Solander 160 acres of land, a portion of which is described as the S. ½ of S. E. ¼ of Section 2, Township 17 North of Range 13 East, in said Tulsa County, and that the Principal Chief of said Nation executed the deed provided by statute for said described land to the heirs of Minnie Solander, and that said George Solander by reason of being the husband of said Minnie and the father of said Hettie, as aforesaid, succeeded to the absolute title in fee simple to all of said described land.

That on the 27th day of April, 1906, the said George Solander, for a valuable consideration, conveyed said described land to said plaintiff, and the deed was filed for record in the office of the Recorder of Deeds for the 28th Recording District of the Indian Territory, at Sapulpa, and that plaintiff is now the owner in fee simple absolute of said described land and entitled to the immediate possession thereof."

The petition of plaintiff further alleges that the defendant Phœbe B. Trusler, claiming to be the sister of said Minnie Solander, and her sole heir at law, by reason whereof she became seized in fee simple of said described land, and her husband joining therein, executed a warranty deed for said described land to this petitioner on the 15th day of August, 1906, which is of record in the office of the Recorder of Deeds at Tulsa, in said County; that said defendant and petitioner is in possession of said described land, claiming adversely to said plaintiff, and refuses to yield and deliver possession to him;

Wherefore he asks for judgment declaring him, the plaintiff, to be the owner in fee of said described lands; that this petitioner and said Phœbe and Frank Trusler be declared to have no right and title in and to the same; that they be barred from setting up or maintaining any action therefor; that said deed to this petitioner be declared null and void and be ordered delivered to this Court
34 to be cancelled and that the title to plaintiff in said lands be quieted against all claims of defendants and that plaintiff have immediate possession of same, and costs and for equitable and proper relief.

Petitioner further states that said supposed defendants, Phœbe and Frank Trusler, as appears from the petition herein of plaintiff, are wholly unnecessary and improper parties to this suit, and by reason thereof their joinder in this petition for removal is unnecessary and would be improper, and they are improperly joined as co-defendants with this petitioner and by reason thereof they are not joined in this petition for removal.

Petitioner further states that the fair and reasonable market value of said described land in this controversy exceeds two thousand dollar, exclusive of interest and costs.

Petitioner herewith files a bond with good and sufficient surety, as provided by the statute of the United States for the removal of causes.

Wherefore petitioner prays the Court for an order directing the removal of this cause to the United States Circuit Court for this the Eastern District of Oklahoma, and that the Clerk of this Court be required to forward to said Court the transcript of record and files provided by the Statute in such cases.

JOHN H. SHELLENBARGER,
Petitioner.

LAWRENCE & LAWRENCE,
Attorneys for Petitioner.

STATE OF OKLAHOMA,
Tulsa County, ss:

I, John H. Shellenbarger, being duly sworn according to law, depose and say that I have heard read the above and fore-
35 going Petition and that the statements thereof are true in substance and fact. Further saith not.

JOHN H. SHELLENBARGER.

Subscribed and sworn to before me on this 10th day of August, 1908.

[SEAL.] ORVILLE S. BOOTH,
Notary Public.

My commission expires Feb. 23, 1912.

Endorsed: William M. Fewel, Plaintiff, vs. Phœbe B. Trusler, Frank Trusler and John H. Shellenbarger, Defendants. Petition of Defendant Shellenbarger for Removal of Cause to U. S. Circuit Court. 21st Judicial Dist., Tulsa Co., Okla. Filed Aug. 11, 1908. W. W. Stuckey, Clerk District Court.

In the District Court Within and for Tulsa County, State of Oklahoma.

No. 898.

WILLIAM M. FEWEL, Plaintiff,
vs.
PHŒBE B. TRUSLER, FRANK TRUSLER, and JOHN H. SHELLENBARGER, Defendants.

Bond on Removal.

Know all men by these presents, that we John H. Shellenbarger, of the County of Tulsa, State of Oklahoma, as principal, and N. L. Ward and I. P. Cullison as sureties, are holden and stand firmly bound unto William M. Fewel in the penal sum of Five
36 Hundred ($500.00) Dollars, for the payment whereof well and truly to be made unto the said William M. Fewel, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns jointly and firmly by these presents.

Upon condition, nevertheless, that whereas the said John H. Shellenbarger has filed his petition in the District Court of Tulsa County, State of Oklahoma, for the removal of a certain cause therein pending wherein the said William M. Fewel is plaintiff and the said John H. Shellenbarger is defendant, to the Circuit Court of the United States in and for the Eastern District of the State of Oklahoma.

Now, if the said John H. Shellenbarger shall enter in the said Circuit Court of the United States on the first day of its next session

a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, we, the said John H. Shellenbarger and N. L. Ward and I. P. Cullison, have hereunto set our hands and seals this 10th day of August, 1908.

JOHN H. SHELLENBARGER. [SEAL.]
N. L. WARD. [SEAL.]
I. P. CULLISON. [SEAL.]

STATE OF OKLAHOMA,
Tulsa County, ss:

N. L. Ward, being first duly sworn on his oath says: that he is a resident of Tulsa County, State of Oklahoma; that he is a freeholder therein and is worth the sum of $2,500.00 over and above all his debts, liabilities and exemptions.

N. L. WARD.

37 Subscribed and sworn to before me on this 10th day of August, 1908.

[SEAL.] ORVILLE S. BOOTH,
Notary Public.

My commission expires Feb. 23, 1912.

STATE OF OKLAHOMA,
Tulsa County, ss:

I. P. Cullison being first duly sworn on his oath says: that he is a resident of Osage County, State of Oklahoma; that he is a freeholder therein and is worth the sum of $1,000.00 over and above all his debts, liabilities and exemptions.

I. P. CULLISON.

Subscribed and sworn to before me on this 10th day of August, 1908.

[SEAL.] ORVILLE S. BOOTH,
Notary Public.

My commission expires Feb. 23, 1912.

Endorsed: No. 898. William M. Fewel, plaintiff, vs. Phœbe B. Trusler, Frank Trusler and John H. Shellenbarger, Defendants. Bond on removal. 21st Judicial Dist., Tulsa Co., Okla. Filed Aug. 11, 1908. W. W. Stuckey, Clerk District Court.

38 And afterwards, to-wit, on the 13th day of August, 1908, said cause coming on for hearing upon the said petition and bond for removal of said cause to said United States Court for the Eastern District of Oklahoma; and the same being argued by counsel and the court having considered the same, ordered and adjudged

that said petition for removal be denied, to which ruling of the court denying removal of said cause said defendant at said time excepted and still excepts. The order of said court denying said petition being in words and figures as follows, to-wit:

Regular June, 1908, Term, August 13th, 1908.

No. 898.

WILLIAM M. FEWEL
vs.
PHŒBE B. TRESSLER et al.

Now on this day this cause coming on to be heard upon the application of the defendant to transfer said cause to the United States Circuit Court.

And the court after hearing said application and the arguments of counsel thereon and being fully advised in the premises, doth deny said application for the reason that said petition does not present for determination a "Federal Question," and to the ruling of the court the defendant excepted.

And the defendant Shellenbarger, is given twenty days to plead further.

And afterwards, to-wit, on the 27th day of August, 1908, the said defendant John H. Shellenbarger filed a demurrer to said petition, which demurrer is in words and figures following:

In the District Court within and for Tulsa County, State of Oklahoma.

No. 898.

WILLIAM M. FEWEL, Plaintiff,
vs.
PHŒBE B. TRUSLER, FRANK TRUSLER, and JOHN H. SHELLENBARGER, Defendants.

39 *Separate Demurrer of Defendant Shellenbarger.*

Comes now the defendant, John H. Shellenbarger, by Lawrence & Lawrence, his attorneys, and demurs to the petition of the plaintiff herein, for the following reasons:

(1) That two causes of action are improperly joined in the same paragraph, to-wit: an action for the recovery of the possession of real property and an action to remove cloud from the title thereto.

(2) That the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

LAWRENCE & LAWRENCE,
Attorneys for Defendant Shellenbarger.

Endorsed: No. 898. William M. Fewel, Plaintiff, vs. Phœbe B. Trusler, Frank Trusler and John H. Shellenbarger, Defendants. Separate Demurrer of Defendant Shellenbarger. 21st Judicial Dist., Tulsa Co., Okla. Filed Aug. 27, 1908. W. W. Stuckey, Clerk District Court.

And afterwards, to-wit, on the 20th day of May, 1909, said cause coming on for hearing upon the demurrer filed by said defendant to plaintiff's petition and the same being argued by counsel, and the court having considered the same, ordered and adjudged that said demurrer be overruled, to which ruling of the court in overruling said demurrer said defendant at said time excepted and excepts, and thereupon leave was given defendant to answer
40 within four days, and thereafter on the 24th day of May, 1909, said defendant filed his answer to said petition, which is in words and figures following:

In the District Court within and for Tulsa County, State of Oklahoma.

No. 898.

WILLIAM M. FEWEL, Plaintiff,
vs.
PHŒBE B. TRUSLER, FRANK TRUSLER, and JOHN H. SHELLENBARGER, Defendants.

Separate Answer of Defendant Shellenbarger.

Comes now the defendant John H. Shellenbarger by Lawrence & Lawrence, his attorneys, and for his separate answer to the petition herein, denies that the plaintiff has any right, title or interest in and to the premises described in said petition.

Defendant further answering, admits that he is in possession of all the premises described in the petition and that he claims title thereto under a warranty deed made by Phœbe B. Trusler and her husband Frank Trusler as alleged in said petition.

Defendant denies each and every other allegation in said petition contained not hereinbefore specifically admitted.

LAWRENCE & LAWRENCE,
Attorneys for Defendant Shellenbarger.

Endorsed: 898. William M. Fewel, Plaintiff, vs. Phœbe B. Trusler, Frank Trusler and John H. Shellenbarger, Defendants. Separate Answer of Defendant Shellenbarger. 21st Judicial Dist., Tulsa Co., Okla. Filed in open court May 24, 1909. W. W. Stuckey, Clerk District Court.

41 And on said 24th day of May, 1909, there was filed in said cause an agreed statement of facts, which is in words and figures following:

In the District Court of Tulsa County.

W. M. FEWEL, Plaintiff,
vs.
PHŒBE TRUSLER et al., Defendants.

Agreed Statement of Facts.

It is agreed by and between the parties to this action, that this cause may be submitted to the court and tried upon the pleadings and the following statement of facts, as all the facts applicable to a determination of this controversy, to-wit:

1st. That Minnie Solander was a citizen by blood of the Creek Tribe of Indians and duly enrolled as such and entitled to an allotment of lands in the Creek Nation.

2nd. That she died intestate on the 8th day of October, 1899.

3rd. That she left surviving her, her lawful and acknowledged husband, George Solander, and one child only (a female) Hettie L. Solander, and a sister, Phœbe Trusler.

4th. That Hettie L. Solander was the legitimate child and born of the body of the said George Solander and Minnie Solander, during their lawful wedlock.

5th. That George Solander and Minnie Solander his said wife was legally married on the 27th day of August, 1898, and that George Solander was at all the times mentioned up to the time of the death of his said wife, Minnie Solander, the lawful acknowledged husband of the said Minnie Solander, and that they cohabited together at all the times aforesaid as such husband and wife.

42 6th. That George Solander was an intermarried white and a non-citizen by blood of the Creek Nation of Indians, and not an adopted citizen.

7th. That Hettie L. Solander herein mentioned was a Creek citizen by blood of the Creek Nation of Indians, and was duly enrolled as a mixed blood Indian, being ¼ Indian Creek blood.

8th. That the said Hettie L. Solander died intestate and without husband or issue on the 19th day of December, 1899.

9th. That the said Hettie L. Solander was the only child of Minnie Solander left surviving her and the only child born of her body.

10th. That the said George Solander was the father of the said Hettie L. Solander.

11th. That Phœbe Trussler was the only sister of Minnie Solander and that Minnie Solander had no brother or brothers surviving her nor descendants of brothers or sisters and was a duly enrolled citizen of Creek Nation, enrolled as a mixed blood Indian.

12th. That George Solander and Phœbe Trussler selected and had the Commission to the Five Civilized Tribes allot to the heirs of Minnie Solander 160 acres of land, a portion of which is described: S. ½ S. E. ¼ section two (2), township seventeen (17) north, range thirteen (13) east in Tulsa County, Oklahoma, formerly Indian Territory.

13th. That the Principal Chief of the Creek Nation of Indians issued an allotment deed to said land with the approval of the Secretary of the Interior, in the name of the heirs of Minnie Solander, deceased.

14th. That George Solander was a resident of the Creek Nation Indian Territory, at all the times mentioned herein but a non-citizen by blood, and had been for a long time prior to the death of his said wife, Minnie Solander.

15th. That George Solander is a native born citizen of the United States of America.

43 16th. That the Creek Nation or Tribe of Indians had a Government, Republican in form, had a written Constitution providing for the three co-ordinate branches of government, to-wit: the Executive, Judicial and Legislative; that the Principal Chief was the executive officer; that the National Council was the legislative body, and that the Supreme Court and the District courts were the judicial bodies.

17th. That the Creek Nation as a political sovereignty had a written and codified form of laws, and that the following is a correct copy of the Creek laws of descent and distribution in force and effect at the time of the deaths of the said Minnie Solander and the said Hettie L. Solander, applicable to the descent and distribution of the estate of the said Minnie Solander and the estate of the said Hettie L. Solander, deceased, as contained in the Creek Statute, to-wit:

Non-Citizen Intermarried—Courts to Have Jurisdiction of Property.

SEC. 76. The courts of this Nation shall have and exercise jurisdiction over all controversies arising out of or pertaining to property rights acquired in this Nation, and situated in the same, by non-citizens who have intermarried with citizens of this Nation, and by reason of such marriage secured rights and privileges in this Nation under which said property was acquired and accumulated by them. The jurisdiction of our courts shall extend to controversies over property and property rights acquired by intermarried non-citizens of our Nation, who by virtue of this intermarriage with citizens acquired such property rights and privileges and that irrespective of whether such controversies are between non-citizens and citizens of the Muskogee Nation, or between any persons whomsoever, who claim in this Nation property rights under and through such intermarried non-citizen which are by them acquired in the manner aforesaid; and all persons hereafter intermarrying with citizens of this nation shall thereby be deemed to consent that the courts of this Nation exercises all jurisdiction over property rights and
44 privileges that they acquire in this Nation by virtue of their said marriage.

SEC. 77. All property brought into this nation by non-citizens in consequence of intermarriage of such non-citizens with citizens of this nation shall likewise be under the jurisdiction of the courts of this nation.

SECTION 6. Be it further enacted that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons and in all cases where there are no children, the nearest relation shall inherit the property.

SECTION 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no heirs, and an heir's part if there should be other heirs in all cases where there is no will.

The husband surviving shall inherit of a deceased wife in like manner.

SEC. 1. All non-citizens not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship shall have the right to live in this nation and enjoy all privileges enjoyed by other citizens, except in participation in the annuities and final distribution in the lands."

19th. That said about laws *was* duly enacted and put in force by the National Council, prior to the deaths of the said Minnie Solander, and the said Hettie Solander, and *was* in force and effect at the time of said deaths.

20th. That the various deeds and conveyances alleged in the petition of plaintiff and the answer and cross-bill of defendants to have been made by the persons therein mentioned were in fact executed and delivered as alleged in said petition and answer and cross bill of defendants.

21st. That this cause be submitted to the court without any fixed rule as to manner of presenting the argument and without and intervention of a jury and nothing herein shall be construed to effect the rights of either party hereto in appeal.

22d. And it is further agreed that either party may introduce in evidence further proof of Creek laws and decisions, contained in McKellop's and Perryman's Compilations; copies of decisions of Creek Supreme Court, relating to the rules of descent in the Creek Nation, subject however, to objections of either party as to their materiality and relevancy.

This May 24/09.

LAWRENCE & LAWRENCE,
Att'ys for Def'ts.
J. J. HENDERSON,
HAINER & MARTIN,
Att'ys for Pl'ff.

Endorsed: 898. Agreed Statement of Facts. 21st Judicial Dist., Tulsa Co., Okla. Filed in open court. May 24, 1909. W. W. Stuckey, Clerk District Court.

The issues having been fully joined this cause came on for trial on the 24th day of May, 1909, being the April, 1909, Term of said Court, and thereupon on said day said action being duly called for trial, the plaintiff William M. Fewel, appearing in person and by Hainer & Martin and J. J. Henderson, his attorneys, and the de-

fendant, John H. Shellenbarger, appearing in person and by Lawrence & Lawrence, his attorneys, and thereupon the following proceedings were had and the following evidence was introduced, the same being all the evidence introduced by both parties at the trial:

46 STATE OF OKLAHOMA,
County of Tulsa:

In the District Court, April Term, 1909.

Before the Hon. Jno. H. Pitchford, J., Presiding. Tulsa, Okla., May 24th.

898.

W. M. FEWELL
vs.
PHŒBE TRUSLER et al.

Appearances:
Hiner & Martin, J. J. Henderson, for plaintiff.
Lawrence & Lawrence, Mr. Booth, for defendants.

Now on this the 24th day of May, A. D. 1909, this cause coming on to be heard, a jury is waived by the parties hereto, and agree that the same may be submitted to the court; the parties both announce that they are ready for trial, whereupon the following proceedings, are had.

(Mr. Marton, offers in evidence the following agreed statement of facts:)

1. It is agreed by and between the parties to this action, that this cause may be submitted to the court and tried upon the pleadings and the following statement of facts, as all the facts applicable to a determination of this controversy; to-wit:

2. That Minnie Solander was a citizen by blood of the Creek Tribe of Indians, and duly enrolled as such and entitled to an allotment of lands in the Creek Nation.

3. That she died intestate on the 8th day of October, 1899.

4. That she left surviving her, her lawful and acknowl-
47 edged husband, George Solander, and one child only, (a female) Hettie L. Solander, and a sister Phœbe Trusler.

5. That Hettie L. Solander, was the legitimate child, and born of the body of the said George Solander, and Minnie Solander, during their lawful wed-lock.

6. That George Solander, and Minnie Solander, his said wife, were legally married on the 27th day of August, 1898, and that George Solander was at all times mentioned up to the time of the death of his said wife Minnie Solander, the lawful, acknowledged husband of the said Minnie Solander, and that they co-habited together at all times aforesaid as such husband and wife.

7. That George Solander, was an intermarried white and a non-citizen by blood of the Creek Nation of Indians, and not an adopted citizen.

8. That Hettie L. Solander, herein mentioned, was a Creek citizen by blood of the Creek Nation of Indians, and was duly enrolled as a mixed blood Indian, being ¼ Indian Creek blood.

9. That the said Hettie L. Solander, died intestate and without husband or issue on the 19th day of December, 1899.

10. That the said Hettie L. Solander, was the only child of Minnie Solander, left surviving her and the only child born of her body.

11. That the said George Solander, was the father of the said Hettie L. Solander.

12. That Phœbe Trusler, was the only sister of Minnie Solander, and that Minnie Solander had no brother or brothers surviving her, nor descendants of brother or sister, and was duly enrolled as a citizen of the Creek Nation, and enrolled as a mixed blood Indian.

13. That George Solander and Phœbe Trusler, selected and had the Commission to the Five Civilized Tribes allot to the heirs of Minnie Solander, 160 acres of land, a portion of which is described as the South half of the southeast quarter of section 2, Township Seventeen north, range thirteen east in Tulsa county, Oklahoma, formerly the Indian Territory.

48 14. That the Principal Chief of the Creek Nation of Indians issued an allotment deed to said land with the approval of the Secretary of the Interior, in the name of the heirs of Minnie Solander deceased.

15. That George Solander, was a resident of the Creek Nation, Indian Territory, at all times mentioned herein, but a non-citizen by blood, and had been for a long time prior to the death of his said wife, Minnie Solander.

16. That George Solander, is a native born citizen of the United States of America.

17. That the Creek Nation, or Tribe of Indians, had a Government, Republican in form, had a written Constitution providing for the three Co-ordinate branches of Government, to-wit: The Executive, Judicial and Legislative. That the Principal Chief was the Executive officer, that the National Council was the Legislative body, and that the Supreme Court and the District Courts were the Judicial bodies.

18. That the Creek Nation, as a political Sovereignty, had a written and Codified form of laws, and that the following is a correct copy of the Creek Laws of Descent and Distribution, in force and effect at the time of the deaths of the said Minnie Solander, and the said Hettie L. Solander, applicable to the descent and distribution of the estate of the said Minnie Solander and the estate of the said Hettie L. Solander, deceased as contained in the Creek Statute, to-wit:

"Non-citizens Intermarried Courts to have jurisdiction of property.

SEC. 76. The courts of this nation shall have and exercise jurisdiction over all controversies arising out of or pertaining to property

rights acquired in this nation, and situated in the same by Non-citizens who have intermarried with citizens of this Nation, and by reason of such marriage secured rights and privileges in this nation under which said property was acquired and accumulated
49 by them. The jurisdiction of our courts shall extend to controversies over property and property rights acquired by intermarried non-citizens of our Nation, who by virtue of this intermarriage with citizens, acquired such property rights and privileges and that irrespective of whether such controversies are between non-citizens and citizens of the Muscogee Nation or between any persons whomosever, who claim in this nation property rights under and through such intermarried non-citizens which are by them acquired in the manner aforesaid; and all persons hereafter intermarrying with citizens of this nation shall thereby be deemed to consent that the courts of this nation exercises all jurisdiction over property rights and privileges that they acquire in this nation by virtue of their said marriage.

SEC. 77. All property brought into this nation by non-citizens in consequence of intermarriage of such non-citizens with citizens of this nation shall likewise be under the jurisdiction of the courts of this nation.

SEC. 6. Be it further enacted that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons and in all cases where there are no children, the nearest relation shall inherit the property.

SEC. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no heirs, and an heirs part if there should be other heirs in all cases where there is no will.

The husband surviving shall inherit of a deceased wife in like manner.

SEC. 1. All non-citizens not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship shall have the right to live in this nation and enjoy all privileges enjoyed by other citizens, except in participation in the annuities and final distribution in the lands.
50 19. That the said above laws were duly enacted and put in force by the National Creek council, prior to the deaths of the said Minnie Solander, and the said Hettie L. Solander, and were in force and effect at the time of the said deaths.

20. That the various deeds and conveyances alleged in the petition of plaintiff and the answer and cross-bill of defendants to have been made by the persons therein mentioned were in fact executed and delivered as alleged in said petition and answer and cross-bill of defendants.

21. That this cause be submitted to the court without any fixed rule as to the manner of presenting the argument and without any intervention of a jury and nothing herein shall be construed to effect the rights of either party hereto *in* appeal.

22. And it is further agreed that either party may introduce in evidence further proof of Creek laws and decisions, contained in

McKellop's and Perryman's Compilations and copies of decisions of the Creek Supreme Court, relating to the rules of descent in the Creek Nation subject however to objection of either party as to their materiality and relevancy.

Signed this 24th day of May, 1909, by the attorneys for the respective parties.

(Plaintiff rests.)

Mr. LAWRENCE: I desire to read from Perryman's and McKellop's compilations of the Creek laws, that is with reference to citizenship and so on.

We now desire to offer in evidence, Article one, Chapter seven of Perryman's Compilation of the laws of the Muskogee Nation, of March 1st, 189-), and published as of that date.

Doubtful citizenship. Section one. All persons having resided out of the limits of the Muscogee Nation, and whose rights as citizens of the same may seem to be questionable in consequence of intermarriage with non-citizens, shall be bona fide citizens of
51 this nation, provided they can prove to the satisfaction of the proper authorities, that they are of Muscogee descent, and not further removed than the fourth degree.

Mr. MARTIN: The plaintiff will object on the ground that it is immaterial and irrelevant.

The COURT: The objection will be over-ruled.

Mr. MARTIN: We will except to the ruling.

Mr. LAWRENCE: Section two. All persons who have been at any time adopted by the recognized authorities of the Muscogee Nation, and all persons of African descent, who were made citizens by the treaty of June, 1866, between the Creek Nation and the United States, shall hereafter be recognized as citizens of the Muscogee Nation.

SEC. 3. Any person claiming citizenship under these provisions, shall, in order to establish his or her rights, prove the same by a responsible and disinterested native witness before the District Court.

Article three, of the same Chapter. Section one. All non-citizens, not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have the right to live in this nation and enjoy all the privileges enjoyed by other citizens, except participation in the annuities and final participation in the lands, and in case of removal from the limits of our nation shall not have the right to sell their improvements, provided, that such person shall satisfy the Principal Chief as to their good character and honest intention, and provided, that the Principal Chief shall grant to such person permit to reside in the Nation during good behavior.

SECTION TWO. The Principal Chief is hereby authorized to grant the permits herein provided for.

Article four, under the head of Rights and Disabilities of non-citizens. Section one. No non-citizen shall have a right to
52 reside in or to own any kind of property within the Muscogee Nation, except by permit, and any non-citizen, without a

permit who shall make any improvements within the Muscogee Nation, shall forfeit the same to the Nation.

SECTION TWO. This article shall not be construed so as to interfere with persons who are intermarried with citizens of the Muscogee Nation, or so as to interfere with any rights guaranteed by treaty.

Article six. Employment of non-citizens. Section one.

No citizen of the Muscogee Nation, nor parties residing in the Muscogee Nation by reason of marriage, shall hire, rent or lease any portion of his land or claim to a citizen of the United States, nor shall any permit be issued to a citizen of the United States, as either farm laborer, hearder of stock *of* laborer of any kind.

SECTION TWO. Any citizen of the Muscogee Nation violating this article shall, upon conviction, be fined not less than fifty dollars, which fine shall be collected by the Captain of the Light Horse, who is hereby authorized to sell any goods or property found in possession of the party fined, to the amount of the fine. One-fourth of the fine shall be retained by the Captain of the Light Horse, one-fourth by the Prosecuting attorney, and the remaining half shall be paid into the National Treasury.

SECTION THREE. This article shall not be so construed as to prevent a citizen of the Muscogee Nation, or those acting under authority of the Muscogee Nation, from employing teachers, mechanics, physicans or clerks who are citizens of the United States.

Article seven. Leasing land on M. K. & T. R. R. to non-citizens. Section one. All citizens of the Muscogee Nation having locations or claims within the limits of three miles of the M. K. & T. R. R., passing through the Nation, are hereby prohibited from renting or leasing the same to any non-citizen.

Any citizen violating this article shall be fined the sum of
53 two hundred dollars, which shall be paid into the Treasury of the Muscogee Nation, to be placed to the general funds, and which shall be charged to the Light Horse Captain in the District where the same is imposed to collect the same.

Article eight. Stock of non-citizens. Section one. No person residing within the Muscogee Nation, under permit, shall be allowed to keep within the limits of the Nation any stock, other than such as shall be necessary for immediate use as work stock.

Article Eleven. Section one. No person not a citizen of the Muscogee Nation, shall be allowed to cut and sell any timber belonging to the Public Domain of the Nation, unless he has authority through a citizen in accordance with existing laws; and any person who shall violate the above law, shall forfeit all timber so cut, and shall be reported to the United States agent as a violater of law.

On page 110 of Perryman's Compilation, the first section on that page, headed Acts of 1882.

Be it enacted by the National Council of the Muscogee Nation: That after the passage of this bill, no permits to enjoy the rights of citizenship shall be granted to non-citizens on account of intermarriage with citizens of the Muskogee Nation. Approved October 5th, 1882.

On page 132, of the same Compilation, *on* the First Paragraph

on that page. Be it further enacted: that any person who shall be convicted of employing or retaining in this Nation any male non-citizen over the age of fifteen years, except as hereinbefore provided, shall be fined in the sum of one hundred dollars.

Be it further enacted: That non-citizens remaining in this Nation, under permits as herein provided, shall not be allowed to employ in their service another non-citizen who *dears* no permit regularly issued by the National Treasurer, embracing the time for which said non-citizen is so employed, and if any non-citizen operating
54 under a permit shall employ another non-citizen bearing no permit, the citizen who is responsible for the presence in the Nation of the Non-citizen so employing another without a permit, shall forfeit the amount of his bond to the Nation.

Be it further enacted: That any person operating under a permit from the National Treasurer, shall not be permitted to own houses or fences of any kind within the nation, or any interest therein; but all houses and fences occupied or used by him shall be the property of a citizen of this Nation; and if any citizen shall be found guilty of permitting the ownership by a non-citizen of any such property in this Nation, or indirectly aiding in bringing about such ownership, he shall for such offense forfeit to the Nation the amount of his bond, if he has one on file, and if he be one having no bond on file, he shall then pay to the Nation a fine hereby affixed at $250; and,

Be it further enacted: That no citizen shall secure permits for any non-citizen to perform any service which is not clearly needful for the comfort and better support of himself or family, and if any citizen shall be found guilty of securing a permit for any non-citizen, under which the benefits accruing therefrom are all to be realized by the permitted, and it shall transpire that the citizen securing said permit did it solely to extend to a non-citizen the privilege attaching thereto, he shall be fined in the sum of $250.

Be it further enacted: That all laws or parts of laws in conflict herewith are hereby repealed.

Approved October 24th, 1884.

Reading from Section six, page thirty-two, of the same compilation, under the head of Civil Laws, approved October 12, 1867, and not repealed.

Be it further enacted: That if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons; and in all cases
55 where there are no children, the nearest relation shall inherit the property.

Reading from McKellop's Compilation, page 101, chapter 19, under the head of census. Section 293. If it shall appear upon a fair investigation that any non-citizen has been enrolled as a citizen, and in consequence thereof has received money or its equivalent from the Muscogee Nation, the Kings and Warriors of the town wherein such non-citizen has been counted shall be liable to the Muscogee Nation for the amount paid to such non-citizen.

Chapter 21. Application for Citizenship, page 105, of McKellop's Compilation, Section 295.

All persons who were born, or who may be hereafter born, beyond the limits of the Indian Territory, and may have heretofore been entitled to make application for citizenship, on account of Indian blood or tribal adoption, and who have continuously resided beyond or outside of the jurisdictional limits of the Muscogee Nation for the period of twenty-one years, are hereby declared aliens, and not entitled to citizenship in the Muscogee Nation, or to any of the privileges thereof.

SECTION 296. The minor children and descendents of persons so debarred from citizenship and declared aliens, are hereby also excluded from citizenship in the Muscogee Nation, and from all the privilege thereof.

SECTION 298. This act shall not apply to persons who have heretofore filed application for citizenship and whose cases are now pending.

Approved October 26, 1889.

Chapter 22, page 106, of the same Compilation; under the head of non-citizens.

SECTION 299. No non-citizen shall, on account of marriage with a citizen of this Nation, acquire any right pertaining or belonging to a citizen of this Nation.

SECTION 300. No non-citizen shall have the right to reside
56 in or to own any improvements in this Nation, except as provided for in the treaties between this Nation and the United States.

Approved October, 1892.

(Defendant rests.)
(Testimony is finally closed.)

After the arguments of counsel, the court finds, as follows:

The court agrees with the counsel for the defendant, in his statement that it was the policy of the Government in removing the Indians west of the Mississippi River, and there giving them a Government of their own, to keep them free from the interference and molestation of the Citizens of the United States. But the white man by reason of his ag-ressive spirit gradually invaded the domain of the Indian and intermarriages followed. And at the time of the agreement referred to by counsel, the citizens of the Creek Nation had recognized that the conditions that existed at the time they were removed west of the Mississippi, had entirely changed; they had recognized the rights of the white people, and they had intermarried among them. However, it never was understood by the Creek lawmakers that the intermarried white man should share in the distribution of the lands of the Tribe, but the time had arrived, however, in the history of the Nation, when Congress saw, that it was impossible for the conditions that then existed in the Five Civilized Tribes to longer continue, and consequently certain agreements were made, with the various Tribes of the present Five Civilized Tribes, for the purpose of allotting the lands in severalty, and at

which time it was agreed by both the parties, that the tribal government should cease, and that the portion of the country known as the Indian Territory would become a part and parcel of the United States, and that the members of the Five Civilized Tribes, should become citizens of the United States, and enjoy all of the privileges of such citizenship.

57 The purpose on the part of Congress was, to as far as possible *to* destroy the distinction that had formerly existed between the citizens of the United States and the Citizens of the Five Civilized Tribes. In the agreement with the Creek Tribe of Indians, the time at which the right to get an allotment of land in the said Tribe would be from the first day of April, 1899. Prior to this date, George Solander had intermarried with Minnie Solander, to whom was born as the issue of said marriage, Hettie L. Solander. Prior to the date of the filing, Minnie Solander departed this life leaving surviving her, her husband, George Solander, and her daughter, Hettie L. Solander.

Hettie L. Solander died prior to the allotment of the lands, now in dispute, and the question comes up for the court to decide as to the ownership of the allotment of Minnie Solander.

The court finds from the statements of facts, that the Creek law, at the time of the death of Minnie Solander, was to the effect that *whenever* the allotment of the lands, to which she was entitled, went to George Solander, her husband, and to her child, Hettie L. Solander; whether by descent or by purchase, it is not necessary to decide.

The court further finds that the interest of the said George Solander and Hettie L. Solander, relate back to the time of the death of the said Minnie Solander, and their right and title to her interest in the allotment of the lands vested at that time.

The court, further finds, that upon the death of Hettie L. Solander, the father, being the nearest of kin, takes the interest of such Hettie L. Solander. If there had been no father, but brothers and sisters on the father's side, and brothers and sisters on the mother's side, the property in that event, would have gone to the brothers and sisters on the mother's side.

A decree is, therefore, rendered in favor of the plaintiff, William M. Fewell, as per Journal entry.

(To all of which the defendant excepts.)

58 STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Joseph Willoughby, the duly appointed, qualified and acting Court Stenographer, in and for the First Judicial District of the above named state, acting in and for the Twenty-first Judicial District thereof, do hereby certify that the above and foregoing is a true, correct and complete transcript of my stenographic notes taken upon the trial of the above styled cause, at the time and place therein set forth.

JOSEPH WILLOUGHBY.
Court Stenographer.

59 And thereupon on the 24th day of May, 1909, judgment was duly rendered and entered of record in said cause in favor of the plaintiff and against the defendant, John H. Shellenbarger, in words and figures following, to-wit:

In the District Court of Tulsa County, Oklahoma.

No. 898.

WILLIAM M. FEWEL, Plaintiff.

vs.

PHOEBE B. TRUSLER, FRANK TRUSLER, and JOHN H. SHELLENBARGER, Defendants.

Judgment.

Now on this 24th day of May, 1909, this cause coming on to be heard, the plaintiff appearing in person and by Hainer & Martin and J. J. Henderson, his attorneys, and the defendant, John H. Shellenbarger appearing in person and by Lawrence & Lawrence his attorneys, and a jury being waived by the parties, the cause is submitted to the Court.

And the Court having heard the testimony offered and the argument of counsel, doth find the issues for the plaintiff and against the defendant John H. Shellenbarger; that the title of plaintiff to the land described in the petition as follows: to-wit: S. ½ of S. E. ¼ of Section 2, Township 17 N., Range 13 E., containing 80 acres and being situate in Tulsa County, state of Okla., is valid and perfect; that said defendant is in the unlawful possession thereof and that the plaintiff is entitled to the possession of said described premises.

It is therefore considered ordered and adjudged, that the plaintiff have and recover of and from the defendant John H. Shellenbarger, possession of said described premises, and that the title of plaintiff thereto is hereby declared valid and perfect, and that the plaintiff recover of and from said defendant his costs herein laid out and expended and have therefor execution.

60 And thereupon on said 24th day of May, 1909, said defendant Shellenbarger filed the following motion and grounds for new trial, to-wit:

In the District Court Within and for Tulsa County, State of Oklahoma.

No. 898.

WILLIAM M. FEWEL, Plaintiff,
vs.
PHŒBE B. TRUSLER, FRANK TRUSLER, and JOHN H. SHELLENBARGER, Defendants.

Motion for New Trial.

Comes now the defendant John H. Shellenbarger and moves the Court to vacate and set aside judgment rendered herein on the 24th day of May, 1909, and to grant his a new trial for the following causes which affect materially the substantial rights of said defendant:

(1) The judgment and decision of the Court is not sustained by sufficient evidence.

(2) The judgment of the Court is contrary to law.

(3) Error of law occurring at the trial and excepted to by the defendant.

LAWRENCE & LAWRENCE,
Attorneys for said Defendant.

Endorsed: 898. Wm. M. Fewell vs. Phœbe B. Trusler et al. Motion for New Trial. 21st Judicial Dist., Tulsa Co., Okla. Filed in open Court May 24, 1909. W. W. Stuckey, Clerk District Court.

61 And thereafter on said 24th day of May, 1909, the Court overruled said motion for new trial, to which action of the court in overruling said motion the said defendant excepted and excepts, and thereupon said defendant Shellenbarger praying an appeal to the Supreme Court and an extension of time in which to make and serve case made, the court ordered that an extension of sixty days be allowed for said defendant to make and serve case made, plaintiff to have twenty days thereafter to suggest amendments, and the same to be settled upon ten days' notice in writing by either party; and thereafter on the 29th day of May, 1909, there was filed in said cause a journal entry, overruling said motion for new trial and allowing appeal as aforesaid, which is in words and figures as follows, to-wit:

In the District Court Within and for Tulsa County, State of Oklahoma.

No. 898.

WILLIAM M. FEWEL, Plaintiff,
vs.
PHŒBE B. TRUSLER, FRANK TRUSLER, and JOHN H. SHELLENBARGER, Defendants.

Order Overruling Motion for New Trial and Allowing Appeal.

Now on this 24th day of May, 1909, the above entitled cause came on to be heard on motion of defendant, John H. Shellenbarger, to vacate and set aside the judgment rendered herein on the 24th day of May, 1909, and to grant defendant a new trial for the reasons set out in defendant's motion for new trial filed on the 24th day of May, 1909, and plaintiff appearing in person and by his attorneys J. J. Henderson and Hainer & Martin, and defendant appearing in person and by his attorneys Lawrence & Lawrence, and said motion being taken up and considered, is by the court overruled, to which action of the court in overruling said motion defendant duly excepted.

62 And said defendant praying an appeal to the Supreme Court and an extension of time within which to make and serve case made, it is ordered that an extension of sixty days from this date be granted said defendant to make and serve case made, plaintiff to have twenty days thereafter to suggest amendments and same to be settled on ten days' notice in writing by either party.

And upon application of said defendant for a supersedeas, it is ordered that the same be and is hereby allowed upon defendant giving a good and sufficient bond to the plaintiff in the sum of One Thousand ($1,000.00) Dollars to be given within twenty days from this date, and upon approval of said bond by the Clerk of this Court, the judgment of this court to stand suspended and execution stayed until the decision of the Supreme Court and the further order of this Court.

JNO. H. PITCHFORD,
Judge of the District Court.

Endorsed: No. 898. Wm. M. Fewel vs. Phœbe B. Trusler et al. Order allowing appeal. 21st Judicial Dist., Tulsa Co., Okla. Filed in open court May 29, 1909. W. W. Stuckey, Clerk of District Court.

And thereafter on the 28th day of May, 1909, said defendant, John H. Shellenbarger, duly filed his said bond which was duly approved by the Clerk of said Court.

63 In the District Court of Tulsa County, Oklahoma.

No. 898.

WILLIAM M. FEWEL, Plaintiff,
vs.
PHŒBE B. TRUSLER, FRANK TRUSLER, and JOHN H. SHELLENBARGER, Defendants.

We hereby certify that the foregoing case made contains a full, true, correct and complete copy and transcript of all the proceedings in said case including all pleadings filed and proceedings had, all the evidence offered or introduced by both parties, all orders and rulings made and exceptions allowed, and all of the record upon which the judgment and journal entry in said cause were made and entered, and that the same is a full, true, correct and complete case made.

Witness our hands this 21st day of July, 1909.

LAWRENCE & LAWRENCE,
Attorneys for Defendant John H. Shellenbarger.

STATE OF OKLAHOMA,
Tulsa County, ss:

We the undersigned, attorneys for the plaintiff in the foregoing suit, hereby certify that the foregoing case was duly served on us on the 21st day of July, 1909.

HAINER & MARTIN,
Attorneys for Plaintiff William M. Fewel.

64 In the District Court within and for Tulsa County, State of Oklahoma.

No. 898.

WILLIAM M. FEWEL, Plaintiff,
vs.
PHŒBE B. TRUSLER, FRANK TRUSLER, and JOHN H. SHELLENBARGER, Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the foregoing case made may be settled immediately and without notice, and the parties hereto request that the Judge of said Court do settle the same as a full, complete and correct case made in said cause and order the same certified to the Clerk of the District Court to be filed according to law.

Dated at Tulsa, Oklahoma, this 16th day of August, 1909.

HAINER & MARTIN,
Attorneys for Plaintiff.
LAWRENCE & LAWRENCE,
Attorneys for Defendant John H. Shellenbarger.

65 STATE OF OKLAHOMA,
Tulsa County:

In the District Court.

No. 898.

WILLIAM M. FEWEL, Plaintiff,
vs.
PHŒBE B. TRUSLER, FRANK TRUSLER, and JOHN H. SHELLENBARGER, Defendants.

I, the undersigned, Judge of said District Court, hereby certify that the foregoing was presented to me as a case made in the action above entitled by the parties to said cause; that the same was duly served in due time and that no amendments thereto have been suggested; that the same as above set forth is a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings and judgments had in such cause, and I now settle — sign the same as a true and correct case made, and direct that it be attested and filed by the Clerk of said Court.

Witness my hand at Tahlequah in Cherokee County, Oklahoma, this 19 day of August, 1909.

[SEAL.] JOHN H. PITCHFORD,
District Judge.

Attest:
W. W. STUCKEY,
Clerk of the District Court.

Certificate of True Copy.

STATE OF OKLAHOMA,
Tulsa County, ss:

I, W. W. Stuckey Clerk of the District Court in and for the County and State aforesaid, do hereby certify that the instrument hereto attached is a full, true and correct copy of record in the above case and case made.

Witness my hand and the seal of said Court at Tulsa, Oklahoma, this 22nd day of Mch., 1910.

[SEAL.] W. W. STUCKEY,
Clerk of the District Court.

66 Endorsed: No. 898. Wm. M. Fewel vs. Shellenbarger, Phœbe B. Trusler et al. Case Made. Filed Aug. 21, 1909. W. W. Stuckey, Clerk District Court.

Case made endorsed on back as follows: 1681. In Supreme Court, Okla. John H. Shellenbarger, Plaintiff in error, v. William M. Fewel, Defendant in error. Petition in error, case made and Transcript of record. William R. Lawrence, Att'y for Pl'ff in error, Tulsa, Okla. Filed May 13, 1910. W. H. L. Campbell, Clerk.

67 And thereafter, to-wit: on the 16th day of January, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, January Term, 1912, January 16th, 1912, Sixth Judicial Day.

1681.

JOHN H. SHELLENBARGER, Plaintiff in Error,
vs.
WM. M. FEWEL, Defendant in Error.

And now this cause is submitted on the record and briefs filed herein.

68 And thereafter, to-wit: on the 19th day of March, 1912, in the Supreme Court of the State of Oklahoma the following proceedings were had in said cause:

Supreme Court, March Term, 1912, March 19th, 1912, Sixth Judicial Day.

1681.

JOHN H. SHELLENBARGER, Plaintiff in Error,
vs.
WM. M. FEWEL, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the lower court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the lower court in the above cause, be, and the same is hereby affirmed.

Opinion by Brewer, C.

By the COURT: It is so ordered, the above opinion is hereby adopted in whole, and judgment is entered accordingly.

69 In the Supreme Court of the State of Oklahoma.

Supreme Court Commission.

Division No. Two.

(Filed March 19, 1912.)

No. 1681.

JOHN H. SHELLENBARGER, Plaintiff in Error,
vs.
WILLIAM M. FEWELL, Defendant in Error.

Syllabus.

1.

When a cause is sought to be removed from a State to a Federal Court, on the sole ground that it is one arising under the Constitution laws or treaties of the United States, the fact that it does so arise, thus making it removable, must be ascertained, from the necessary allegations of plaintiff's statement of his own cause of action. And in determining the question, resort may not be made to the allegations in the petition for removal or in later pleadings.

2.

A cause cannot be removed from a state, to a Federal Court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States; in such cases the State Courts are competent to determine the matter in the first instance.

3.

Under Sec. 6122, Oklahoma Statutes (Comp. Laws 1909) the plaintiff, in an action for the recovery of real estate, is not required to deraign his title with particularity.

4.

The law of descent, in force at the date the selection of a Creek allotment takes effect, governs as to the classification of the heirs; and this law relates back to the death of the Indian entitled to take the allotment, and identifies such heirs as of that date.

5.

Under the Creek law of descent and distribution, put in force, by the Original Creek Agreement (31 U. S. Stat. 861) an intermarried non-citizen husband, receives out of his deceased citizen wife's allotment an heir's part. (Following De Graffenried vs. Iowa L. & T. Co. 20 Okla. 711.)

Error from the District Court of Tulsa County.

John H. Pitchford, Trial Judge.

Affirmed.

William R Lawrence, Attorney for Plaintiff in Error.
B. T. Hainer, H. B. Martin, Attorneys for Defendant in Error.

70 *Opinion by Brewer, C.*

Suit for possession of lands, cancellation of deeds, and to quiet title. This action was filed July 13, 1908, in the District Court of Tulsa County. The cause was submitted to and tried by the court, by agreement of the parties, on an agreed statement of facts, summarized as follows:

That Minnie Solander, was a duly enrolled citizen by blood of the Creek Nation, and entitled to an allotment at the date of her death, intestate, October 8, 1899; that she left surviving, her husband, George Solander and one child, Hettie Solander, and a sister Phœbe Trusler; that Hettie, was the legitimate child of Minnie and George Solander; that the husband George Solander, was not of Creek blood; that the child Hettie was of ¼ Creek Blood; that Hettie died, December 19, 1899, intestate, and without issue, and was the only child of Minnie; that Phœbe Trusler, was of Creek Blood, and the only sister of Minnie; and Minnie had no brother nor were there children of deceased brothers or sisters; that George Solander and Phœbe Trusler selected and had allotted to the heirs of Minnie Solander, the S. ½ of the S. E. ¼ Sec. 2 Tp. 17 N. R. 13 E. Tulsa County, Oklahoma, that thereafter patent was issued in the name of the heirs of Minnie Solander, deceased. It is further admitted in the agreed statement of facts as follows:

"That the Creek Nation as a political sovereignty had a written and codified form of laws, and that the following is a correct copy of the Creek laws of descent and distribution in force and effect at the time of the deaths of the said Minnie Solander and the said Hettie L. Solander, applicable to the descent and distribution of the estate of the said Minnie Solander and the estate of the said Hettie L. Solander, deceased, as contained in the Creek Statutes, to-wit:

71 The laws of the Creek Nation are set out, among the sections being as follows:

"Sec. 6. Be it further enacted that if any person die without a will having property and children, the property shall be equally divided among the children by disinterested persons and in all cases where there are no children, the nearest relation shall inherit the property.

Sec. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one half of the estate, if there are no heirs, and an heir's part if there should be other heirs in all cases where there

is no will. The husband surviving shall inherit of a deceased wife in a like manner."

At page 37 of plaintiff in error's brief the issue is stated thus:

"The sole inquiry is who were the heirs of Minnie and Hettie Solander under the Creek law of descent. (Sec. 8, supra.)"

William M. Fewell, was plaintiff below, and John H. Shellenbarger, was defendant; they will be referred to herein as they were known in the trial court.

The plaintiff claimed title under a deed from George Solander, as sole heir of Minnie and Hettie Solander his deceased wife and child, dated April 27, 1906. The defendant claimed title under a deed from Phœbe Trusler as sole heir, dated August 15, 1906. The execution of the deeds by the respective parties was admitted. The court found that George Solander, took the property as heir, and having conveyed it to plaintiff, gave plaintiff judgment.

There are but two questions to be determined in this case.

First. Whether this cause was removable to the United States Court on application of defendant?

Second. To determine who under the laws of descent and distribution of the Creek Nation, took this allotment as heir?

72 We will consider first the question of removability. The jurisdiction of the Circuit Courts of the United States, is defined in the act of March 3, 1887, as corrected by the amendatory act of August 13, 1888. (Chap. 866, Vol. 1 Sup. Rev. Stat. U. S. Page 611) and so far as necessary to be examined here is as follows:

"SEC. 1. That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, etc. * * *"

The authority for removing a suit upon the ground that it arises—"under the constitution or laws of the United States, etc."—is found in the same act, supra, as follows:

"SEC. 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district."

Before proceeding to a discussion of the matter, it is proper to observe, that the single question here is, whether the cause is a removable one, because—"arising under the constitution or laws, or treaties, etc., of the United States,"—no other questions, such as diversity of citizenship, and others mentioned in the statutes, are involved. Therefore logically, and indeed necessarily, the first in-

quiry is: What *is* a controversy—"arising under the consti-
73 tution or laws of the United States," and how defined? In the text, Encyclopedia of U. S. Supreme Court Reports, 670, such controversies are defined as follows:

"Where it has in some way been made to appear on the face of the record that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States, or sustained by an opposite construction in the state court, the case may be removed, regardless of the citizenship of the parties."

The above definition may have been deduced from the case of Carson vs. Dunham, 121 U. S. 421, wherein it is said:

"The suit must be one in which some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the constitution, or a law or treaty of the United States, or sustained by a contrary construction." Cited with approval in Tenn. vs. Union & P. Bank, 152 U. S. at page 461.

And in Starin vs. New York, 115 U. S. 248, 257, it was stated, as the effect of all the authorities on the subject, that if, from the question involved in the suit:

"It appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not." Cited with approval in S. P. R. R. Co. vs. Calif., 118 U. S. 109.

In the judiciary act of 1887, as corrected by the act of August 13, 1888, supra, the language giving jurisdiction in this class of cases is identical with that of the act of 1875, except as to the amount involved in the controversy.

The following cases involve different phases of the clause of the judiciary act under consideration: Cohens vs. Virginia, 6 Wheat. 264, 379, 5 L. Ed. 257; Osborne v. United States Bank, 9 Wheat 738, 824, 6 L. Ed. 204; The Mayor v. Cooper, 6 Wall. 247,
74 252, 18 L. Ed. 851; Gold Washing etc. Co. v. Keyes, 96 U. S. 199, 201, 24 L. Ed. 656; Tennessee v. Davis, 100 U. S. 257, 264, 25 L. Ed. 648; Railroad Co. v. Mississippi, 102 U. S. 135, 141, 26 L. Ed. 96; Babbitt v. Clark, 103 U. S. 606, 612, 26 L. Ed. 507; Bush v. Kentucky 107 U. S. 110, 115, 27 L. Ed. 354; Ames v. Kansas, 111 U. S. 449, 462, 28 L. Ed. 482; Kansas Pac. R. Co. v. Atchison etc. R. Co. 112 U. S. 414, 416, 28 L. Ed. 794; Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257; Provident Sav. etc. Society v. Ford 114 U. S. 635, 642, 29 L. Ed. 261; Pacific Railroad Removal Cases, 115 U. S. 1; 29 L. Ed. 319; Tennessee v. Whitworth, 117 U. S. 129, 139, 29 L. Ed. 830; Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 475, 30 L. Ed. 461; Gibbs v. Crandall, 120 U. S. 105, 106, 30 L. Ed. 590; Leather etc. Bank v. Cooper, 120 U. S. 778, 780, 30 L. Ed. 816; Bock vs. Oerkins, 139 U. S. 628, 35 L. Ed. 314; Virginia v. Paul, 148 U. S. 107, 120 37. L. Ed. 386.

The next step in the investigation here, involves the question, of

how the removability of a cause, shall be determined, when sought on this ground.

It appears to be the well settled law, that to warrant the removal of a cause, on the sole ground that it is one—"arising under the constitution or laws of the United States,"—that, the fact that it does so arise, thus affording grounds for removal, must appear, in the plaintiff's statement of his own claim, alleged in the state court, and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or in later pleadings.

In Tenn. vs. Union & P. Bank, 152 U. S. at page 461, it is said:

"The question whether a party claims a right under the constitution or laws of the United States is to be ascertained by the legal construction of its own allegations and not by the effect attributed to these allegations by the adverse party."

75 The Court in that case quoted the above language with approval from Central R. C. of N. Y. v. Mills, 113 U. S. 249, 257, and in Filhiol vs. Maurice 185, U. S. 108, it is said:

"It is settled that in order to give the circuit court (U. S.) jurisdiction of a case as so arising, that it does so arise must appear from the plaintiff's own statement of his claim."

See also the more recent case of Joy v. St. Louis, 201, U. S. 332, wherein it is said:

"It is a long settled rule, evidenced by many decisions of this court, that, the plaintiff cannot make out a case as arising under the Constitution or laws of the United States unless it necessarily appears by the complaint or petition or bill in stating plaintiff's cause of action." Citing Gold Washing Co. vs. Keyes, 96 U. S. 199.

In the H. & T. R. R. Co. vs. Texas 177 U. S. 66, it is said in the syllabus:

"The Federal character of a suit must appear in the plaintiff's own statement of his claim, and where a defense has been interposed, the reply to which brings out matters of a Federal nature, those matters thus brought out by the plaintiff do not form a part of his cause of action."

And it is held that in that case, a motion to remove to the Federal court was properly denied, but when heard in the Supreme Court on writ of error to the Court of Appeals of Texas the court took jurisdiction and reversed the cause, on the Federal question involved.

To illustrate the principle now under discussion—i. e.—that the right of removal must be determined, alone from the plaintiff's statement of his claim, we quote from the last cited case (H. & T. C. R. Co. vs. Texas, 177 U. S. 66):

"The suit, as it appears upon the face of the petition of plaintiff, was upon the bonds given by the company for the loan of
76 a portion of the school fund, and to foreclose the lien of the State upon the property of the company, and in the petition reference was made to the act of 1870 for the purpose of stating the amount due on the bonds for principal and interest. Nothing upon the face of this petition showed any fact upon which Federal jurisdiction could be based. The company answered by alleging certain

payments in treasury warrants, which, if properly credited, would show that with the other payments that had been made there was nothing due the plaintiff on the bonds. As an answer to this defense the plaintiff set up the invalidity of the laws providing for payments in treasury warrants; that the warrants were issued by the state in violation of both the state and federal constitutions, and that the payments were therefore illegal and void. This was no part of the plaintiff's cause of action upon which suit was brought, and that cause of action did not in any way involve a question arising under the Constitution or laws of the United States. The defendant, therefore, made out no case for a removal to the United States Circuit Court, citing: Oregon &c. Railway Co. v. Ekottowe, 162 U. S. 490, 494; Tennessee vs. Union & P. Bank, 152 U. S., 454; Galveston, Harrisburg &c. Ry. Co. v. Texas, 170, U. S. 226, 235."

As has been seen in the foregoing authorities, to show the removability of a cause under this clause of the statute, it must not only appear that the controversy arises under the constitution or laws of the United States, but such must appear in the necessary statements by plaintiff, in the State court, of his cause of action. And that matter set up by plaintiff in reply to an answer, although showing a Federal question, will not create a cause for removal. And even in construing plaintiff's statement of his cause of action, statements he may make therein which are unnecessary, are not to be considered as showing jurisdiction in the Federal Court, or a ground for removal. Nor can the plaintiff, show jurisdiction in the Federal Court, or ground for removal thereto by averments in his petition as to what defense will be interposed, or that it will involve a
77 Federal question. The above is fully sustained in Joy vs. St. Louis, 201 U. S. 332, wherein it is said:

"This original jurisdiction, it has been frequently held, must appear by the plaintiff's statement of his own claim, and it cannot be made to appear by the assertion in the plaintiff's pleading, that the defense raises or will raise a Federal question. As has been stated, the rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of his cause of action, leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of plaintiff's cause of action imposing upon the defendant the burden of proving such defense. This principle was given effect to in Tennessee v. Union & Planters' Bank, 152 U. S. 454; Muse v. Arlington Hotel Co. 168, U. S. 430; Third Street &c. Co. v. Lewis, 173 U. S. 457; Arkansas v. Coal Co. 183 U. S. supra; Filhiol v. Maurice, 185 U. S. 108; Boston &c. Co. vs. Montana &c. Co. 188, U. S. supra."

And it may be well to bear in mind, that, as was said in Cook County vs. Calumet &c. C. Co., 138 U. S. 635, 653:

"The validity of a statute is not drawn into question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

See also, Doe vs. City of Mobile, 9 How. 451; Telluride P. Co. vs. Rio Grande & Ry. Co. 175 U. S. 639, 647. Little York G. W. N. & W.

Co. vs. Keyes, 96 U. S. 199, 203; and also Tenn. vs. Union & P. Bank, 152 U. S. 454, wherein it is said:

"A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States."

See also, Carson vs. Dunham 121 U. S. 421, Chicago R. Co. vs. Martin, 178 U. S. 245; Defiance Water Co. vs. Defiance 191 U. S. 184.

78 And to illustrate we quote from certain cases, wherein it was held no Federal question was presented as follows:

In the case of Filhiol vs. Maurice decided by the United States Supreme Court in Vol. 185, page 108. The action was one of ejectment, plead by plaintiff originally in the circuit court of the United States, for the recovery of land in the City of Hot Springs, Arkansas, on the permanent reservation, described as Bath House No. 8 and for rent as damages. The plaintiff in his petition deraigned title through an ancester whom he alleged held under Spanish Grant, and for cause of action claimed that by the 5th amendment of the constitution of the United States and the 3rd art. of the treaty of the United States with the Republic of France, the United States undertook and agreed to maintain plaintiff's ancestor and heirs, in their title to the land in controversy and in enjoyment of the same; but that under violation of the treaty and without due process of law and in violation of the 5th amendment of the constitution of the United States, that defendant had without right ousted plaintiff from possession and was wrongfully holding possession of the land etc.

In that case, the court held that it did not appear from plaintiff's own statement that the case arose under the constitution or a treaty of the United States. In thus deciding the court say:

"But no right, title, privilege or immunity was here asserted as derived from the Constitution or the treaty, as against *the* these private individuals, who were impleaded as defendants, either specifically, or through averments that plaintiff *were* ousted in violation of the treaty and of the fifth amendment, the provisions of which it was the duty of the federal government to observe.

79 The gravamen of the complaint was that plaintiff's ancestor had a perfect title, to which they had succeeded, and the appropriate remedy for illegal invasion of the right of possession was sought, but it was not made to appear that the circuit court had jurisdiction for the action was not against the United States, nor could it have been as the United States had not consented to be so sued, and so far as defendants were concerned, it was not charged, that they took possession by direction of the Government, and plaintiffs set up no more than a wrongful ouster by merely private persons, remediable in the ordinary course, and in the proper tribunals. And see Arkansas vs. Coal Co. 183 U. S. 185; Muse v. Arlington Hotel Co. 168, U. S. 430."

The case of Telluride P. T. Co. v. Rio Grande W. Ry. Co. 175 U. S. 639, was a suit filed in the District Court of Utah, by the Railway Co. against the Power Co. The Complaint set forth that the

railway Company was authorized to construct a railway in Provo Canyon, on either of two routes; that it had commenced the survey of the line which passed over certain tracts of land of the United States, of which one Murphy was in the possession, prior to the survey; that it became the owner of this right of way, under the act of Congress affirming such right, etc.; and that while in lawful possession of the land, the defendant set up an adverse claim and stopped its work by force and denied its right to use the land for railway purposes. It demanded a decree adjudging the adverse claim unfounded, that its rights be affirmed, and that defendants be enjoined. In passing on the case on a writ of error to the Supreme Court of Utah, the court say:

"The position of the plaintiffs in error is that, as their whole case depended upon the rights asserted by them under section 2339 (U. S.) and that, as the courts decided adversely to the rights claimed by them, there was no necessity of a special reference to that statute."

In dismissing the case on the ground that no federal question was involved, the court say:

80 "But the difficulty in this case is that, before it could be said that any right or title under statute of the United States had been denied, it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws and decisions. These were local and not federal questions. The jurisdiction of this court in this class of cases does not extend to questions of fact or of local law, which — merely preliminary to, or the possible basis of, a federal question."

The United States court for the Eastern District of Oklahoma, has considered, in other cases similar to this, the question of its jurisdiction, and held against it. The case of Taylor vs. Anderson, was commenced by original petition in the United States court for the Eastern District of Oklahoma, a demurrer was sustained to the petition on the ground that the court had no jurisdiction, for the reason that the petition did not show, by its necessary and proper averments, that it was one arising under the constitution and laws of the United States. That case was stated as fully as possible, and with the purpose of showing, if possible, federal jurisdiction. The plaintiffs were shown to be full blood Choctaw Indians, heirs of a full blood, deceased allottee; the petition set up the patent to their ancestor, and specifically plead the various sections of the treaties and acts of congress relating to the allotment of lands, the patent thereto, and the restrictions against alienation. Also that the heirs had executed a void deed to the lands, without sufficient consideration, and in violation of the laws of congress, and that the defendants had attempted by deed to convey the lands, and were withholding the possession from plaintiffs; etc., and that plaintiffs were entitled to possession and the rents and profits, etc. In that case the petition alleged that the primary question to be determined was a construction of the acts of Congress, etc.

81 In that case, Judge Campbell, held in a memorandum opinion (not reported) that the United States Court was with-

out jurisdiction, following and quoting extensively from the case of Joy vs. St. Louis, supra, which he considered controlling, in the course of an exhaustive and able opinion he says:

"If in the case at bar the answer of the defendants should set up the defense anticipated by the plaintiffs, that is, should rely upon the deed of July 31, 1905, and should contend that under a proper construction of the acts of congress referred to, the plaintiff could and did legally convey the premises in controversy by such deed, then there would arise a question as to the proper construction of such acts of congress, and a federal question would then be involved. But the defense may not rely upon such defense. They may rely upon a deed of later date from the plaintiffs, taken at such time and under such circumstances as would render it valid. They may deny that plaintiffs' ancestor was in fact the allottee of the land, and may rely upon a deed from some other source. There are various defenses which they might set up other than that anticipated by the plaintiffs in their petition, which would not involve the construction of the acts of congress referred to, but raise only questions under the state laws or questions of fact. But the question raised by the demurrer must be determined from a consideration of the necessary and proper allegations of the petition, shorn of all necessary parts, and so considered it cannot be said to present a case arising under the constitution or laws of the United States, hence does not state a case within the jurisdiction of this court. Should the plaintiffs hereafter commence this action in the proper state court and the defendants there set up in their answer the defense which the plaintiffs anticipate, then a federal question will be presented which the state court in the first instance has jurisdiction to determine. If the decision of the trial court on this federal question be adverse to the plaintiffs, they may appeal to the Supreme Court of the state; if the decision of that court on the question be again adverse to the plaintiffs, they may appeal to the Supreme Court of the United States, and thus finally have the question decided by a Federal Court."

82 The case at bar, as has been said, is essentially one of ejectment, and while in such case the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary, yet, it was unnecessary for him to allege in his petition how his estate or ownership arose.

By section 6122 Comp. Laws 1909, it is provided:

"In an action for the recovery of real property, it shall be sufficient if a plaintiff state in his petition that he has the legal or equitable estate therein and is entitled to the possession thereof, describing the same as required by section 5667, and that the defendant unlawfully keeps him out of possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived."

By section 6123, supra, it is further provided:

"That it shall be sufficient in such action if the defendant in his answer deny generally the title alleged in the petition, or that he withholds the possession, as the case may be. But if he deny the

title of the plaintiff, possession by the defendant shall be taken as admitted."

It follows, that it was unnecessary for plaintiff to have deraigned his title with particularly. And his allegations as to the claim under which defendant was holding, thus anticipating what his defense would be, cannot be considered, as raising a Federal question, as was said by Judge Campbell in the Taylor case, supra, the defendant might not use the defense anticipated, but might rely upon any one of a number of other defenses proper under the law. In fact this is conclusively shown in this case, wherein the defense was a general denial, coupled with an admission of possession as alleged in plaintiff's petition. Under this answer, it is patent, that the
83 defendant could have used and relied upon various defenses, which would in no sense involve a federal question. That he did not do so, is immaterial; for if in the progress of the case a federal question has become involved, and is decided here adversely to defendant, his remedy, would be by writ of error from the Supreme Court of the United States to this court.

It may be added that the petition in this case fails to show that the amount in controversy is sufficient to give the Federal Court jurisdiction. It is true a copy of the deed relied upon is plead and attached as an exhibit to the petition, and shows a consideration of $4,500.00, but an examination of same shows that the deed covers a much larger quantity of land than is involved in this suit, and for that reason, does not show the amount in controversy here. We are fully convinced, and hold, that under the facts of this case, and the authorities cited, there was no error in refusing the petition to remove to the Federal Court.

(2) We now come to consider the remaining proposition in the case. The record is silent as to the date of the selection of the allotment, but from the admissions in the agreed statement of facts, and the briefs of both parties, we must conclude that the allotment was selected and certificate thereof issued, under the "Original Creek Agreement." (Act of Congress of March 1, 1901, C. 676, 31 Stat. 861.)

Such being the case, the allotment of Minnie Solander, not having been made at the date of her death, but later made under the "Original Creek Agreement" supra, the same descended to her heirs according to the law of descent and distribution of the Creek Nation, as admitted and contended by both parties in this case. In the case of De Graffenried et al. vs. Iowa L. & T. Co. 20 Okla. at page 711, in discussing the original Creek Agreement, on
84 this point it is said:

"In short section- 6 and 7 of this agreement fix the descent of the allotment (both surplus and homestead) in cases where the allottee received his allotment before he dies, and section 28 fixes it in cases where he dies before receiving his allotment. In either case it was intended to "descend to his heirs according to the laws of descent and distribution of the Creek Nation."

In the case of Barnett vs. Way, — Okla. — 119 Pac. 418, it is said:

"We think it was the intent to provide that the land to which a deceased Indian, who was entitled to an allotment, should be allotted to and received by those persons as heirs of such Indian that would have received it under the Creek laws, if the allotment had been made to the deceased at the time of his death and had descended under said law."

In the Barnett case, supra, the allotment was selected and certificate issued under the "Curtis Act" (Act June 28, 1898, 30 Stat. 495) which provided for an allotment of the use and occupation of the surface only, and the Indian entitled to the allotment died before the adoption of the original Creek Agreement. In the body of the opinion it is said:

"What the rule of descent and distribution was at the time of the death of Cita Barnett and her father, George Barnett, is unimportant; for, at the time of her death, she had no title, equitable or legal, in the fee in her allotment to descend. The rule of descent and distribution adopted by the treaty and to be applied in such case is the rule of descent and distribution in force in the Creek Nation, governing the devolution of property owned by any of its deceased members at the time of such member's death."

It has been held in Brady vs. Sizemore, — Okla. — (Not officially reported) that where a duly enrolled citizen of the Creek Nation died before receiving his allotment, and it was later allotted to his heirs, August 23, 1902, (Under the "Creek Supplemental Agreement) Act of Congress approved June 30, 1902, ratified July
85 26, 1902) that the devolution of the allotment is governed by Chapter 49 of Mansfield's Digest of the laws of Arkansas, to be applied as if deceased had received title to his allotment and died seized thereof. See Sanders vs. Sanders, 28 Okla. 59; Hooks vs. Kinnard, 28 Okla. 457; Barnett vs. Way, supra, and Brady vs. Sizemore, supra.

It may be gathered from a reading of the cases decided in this court, upon the question of the devolution of a Creek allotment, that, the law of descent, in force at the date the selection of the allotment takes effect, governs as to the classification of the heirs; and this law relates back to the death of the Indian entitled to the allotment, and identifies the heirs as of that date.

The selection of an allotment, under the "Curtis Act" supra, though made prior to, takes effect upon the date of the approval of the Original Creek Agreement, supra, and allotments so selected together with those selected under the "original Creek Agreement" pass to the heirs of the Indian entitled to take the allotment, under the Creek laws of descent; while those allotments selected under the Creek Supplemental Agreement, (Act of Congress June 30, 1902, 32 Stat. L. 500) pass under the laws of descent found in chapter 49 of Mansfield's Digest of the laws of Arkansas. In either event you take the governing law of descent, and carry it back to the date of the death of the Indian entitled to take the allotment, and, identify the heirs of such Indian, under such law of descent, as of the date of such death.

Then who were the heirs, under the Creek law of descent, of

Minnie Solander. Plaintiff contends they were her non-citizen husband, George Solander, and her daughter Hettie Solander.
86 Defendant contends that her sister Phoebe Truslter was her heir, for the reason that her daughter Hettie died before the selection of the allotment, and that her non-citizen husband could not inherit.

We think, under the law and the decisions of this court, that the contentions of the plaintiff are correct. That the non-citizen husband would take an heir's part, under the Creek law of descent, has been held by this court, upon exhaustive and satisfactory reasoning. In De Graffenried vs. Iowa L. & T. Co. supra, it is said:

"When in the original agreement "the Creek people said that the allotments made thereunder should descend under the laws of descent and distribution of the Creek Nation, it necessarily follows that they meant that therein the intermarried non-citizen husbands should receive out of his citizen wife's allotment an heir's part, etc."

That an allotment, under circumstances similar to the ones here, would go to the heirs, as of the date of the death of the Indian entitled to the allotment, has been held in Barnett vs. Way and Brady vs. Sizemore, and Morley vs. Fuel, — Okla. — (Not officially reported) supra.

Therefore, her daughter, Hettie, being alive when her mother died, and being the only child, and her non-citizen father being held entitled to take an heir's part, it follows that the allotment of Minnie, passed to George and Hettie Solander in equal parts, and upon the death of Hettie Solander, intestate and without issue, December 19, 1899, her share was cast upon her father George Solander, as her nearest relation, who had the right April 27, 1906, to convey the whole estate to plaintiff as was done.

The cause should be affirmed.

March 19, 1912.

By the COURT: Adopted in whole.

87 In the Supreme Court of Oklahoma.

No. 1681.

JOHN H. SHELLENBARGER, Plaintiff in Error,
vs.
WILLIAM M. FEWELL, Defendant in Error.

Petition for Rehearing.

Comes now said plaintiff in error, and respectfully represents to the court that on the 19th day of March, 1912, a decree and judgment was rendered by this court in said cause wherein it was adjudged that judgment of the court below should be affirmed.

That the decision overlooked a question decisive of the case, being the following laws of the Creek Nation in force at the time the supposed right accrued of George Solander, the surviving husband of

Minnie Solander, his wife, and father of Hattie Solander, his child, at the time of their deaths in October and December, 1899, namely:

"SEC. 299. No non-citizen shall on account of marriage with a citizen of this Nation, acquire any right pertaining or belonging to a citizen of this Nation."

Approved October 26, 1889.

"SEC. 300. No non-citizen shall have the right to reside in or to own any improvements in this Nation, except as provided in the treaties between this Nation and the United States.

Approved October, 1892."

being part of the Creek laws introduced and read in evidence on part of this plaintiff in error in the trial court, and appearing in case-made, and on page 24 of the abstract of this case.

"SEC. 1. All non-citizens not previously adopted, and being married to citizens of this Nation, or having children entitled to citizenship, shall have the right to live in this Nation and enjoy all the privileges enjoyed by other citizens, except in participation in the annuities and final distribution of the lands."

19th item of agreed statement of facts, p. 17 Ab., immediately following the last above named section, is as follows:

"That said above laws were duly enacted and put in force by the National Council, prior to the deaths of said Minnie Solander and said Hattie Solander, and were in force and effect at the time of their deaths."

Wherefore, the said plaintiff in error prays that a rehear-
88 ing of said cause may be had by your honorable court.

WILLIAM R. LAWRENCE,
Att'ys for Pl'ff in Error.

Endorsed on back: No. 1681. Shellenbarger, Pl'ff in Error, vs. Fewell, Def't in Error. Pet. for Rehearing. Filed Apr. 3, 1912. W. H. L. Campbell, Clerk.

89 And thereafter, to-wit: on the 4th day of June, 1912, in the Supreme Court of the State of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, May Term, 1912, June 4th, 1912, Eighth Judicial Day.

1681.

JOHN H. SHELLENBARGER, Plaintiff in Error,
vs.
WM. M. FEWEL, Defendant in Error.

And now on this day, it is ordered by the court, that the petition for rehearing filed herein, be, and the same is hereby denied.

90 In the Supreme Court of the State of Oklahoma.

Certificate.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 89 pages, numbered from 1 to 89, both inclusive, are a full, true and complete transcript of the record and all proceedings in this court, in said cause No. 1681, John H. Shellenbarger, Plaintiff in error, versus William M. Fewel, Defendant in error, as the same remains of record and on file in my office.

In witness whereof, I hereto set my hand and affix the seal of said Court, at Oklahoma City, this 8th day of January, 1913.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 23,512. Oklahoma Supreme Court. Term No. 434. John H. Shellenbarger, plaintiff in error, vs. William M. Fewell. Filed January 18, 1913. File No. 23,512.

9

White Supreme Court, U. S.
FILED
JUN 11 1913
JAMES D. MAHER
CLERK

In the

Supreme Court of the United States

October Term, 1913.

No. 108

JOHN H. SHELLENBARGER, Plaintiff in Error,

vs.

WILLIAM M. FEWELL, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Brief of Plaintiff in Error.

WILLIAM R. LAWRENCE,
Attorney for Plaintiff in Error.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1913.

No. 434.

JOHN H. SHELLENBARGER, - *Plaintiff in Error,*

vs.

WILLIAM M. FEWELL, - - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF *of* PLAINTIFF *in* ERROR

Statement of Case.

July 13, 1908, defendant in error, to whom we shall refer as plaintiff, brought his action in the District Court of Tulsa County, Oklahoma, against this plaintiff in error, whom we shall likewise refer to as defendant, and Phoebe Trussler and Frank Trussler, her husband, alleging in his petition that Minnie Solander was a Creek citizen by blood of the Creek Nation of Indians, and died Oct. 8, 1899, leaving a husband, George Solander, a non-citizen of said Nation, and leaving an infant daughter, Hattie, a citizen by blood of said nation, who died Decem-

ber 19, 1899. Both of said citizens at time of their deaths were enrolled as such, and entitled to have and receive their respective allotments out of the public lands of the said nation, but neither had received her allotment prior to her death. Thereafter the said George Solander selected, and caused to be allotted to the *heirs* of said Minnie Solander, 160 acres out of the public domain of said nation, being the southeast quarter of section 2, township 17 north, range 13 east, in said Tulsa County, the south half of which is the subject of this action. A deed therefor was executed by the principal chief of said nation, "*to the heirs of Minnie Solander,*" without further description, and was approved by the Secretary of the Interior.

That said George Solander, as husband of said deceased, Minnie Solander, succeeded to one-half of said land, and the said Hattie, as her sole descendant, to the other half. Upon the death of said Hattie, her said father, as her sole heir at law, succeeded to her half of said land.

April 27, 1906, the said George Solander, by deed of warranty, conveyed the south half of said land to plaintiff, and upon same day it was filed for record in the office of register of deeds of said county.

Said Phoebe Trussler claimed, by reason of being a sister of said Minnie Solander, that she was the sole heir at law of said Minnie and Hattie So-

lander, and thereby became the owner in fee of the whole of said land upon the death of Hattie Solander. On the 15th day of August, 1906, the said Phoebe and her husband executed a deed of general warranty to the defendant for said south half of said land, which was filed for record in the office of said register of deeds.

Plaintiff avers that said deed to defendant is a cloud upon his, plaintiff's, title to said land, and that he is entitled to have the same removed and canceled, and "that *she, her husband* and defendant Shellenbarger are claiming some rights and title in and to said land adverse to plaintiff."

Avers that defendant Shellenbarger is in possession of the land adverse to plaintiff, and wrongfully withholds same after demand by plaintiff.

Prayer for decree declaring plaintiff the owner in fee simple of said land and entitled to immediate possession; that deed to defendant be ordered surrendered to the court and canceled and declared null and void; for costs, and equitable and *proper* relief.

The Trusslers, defendants, not served, and no appearance entered by them.

Demurrer of defendant to petition because of improper joinder of two causes of action, one for possession and the other to remove cloud from title; and further, that it does not state facts to constitute a cause of action.

Demurrer overruled; exception by defendant.

Answer of defendant denies that plaintiff has any right, title or interest to land described in the petition; admits his possession, and that he claims title under the deed of Phoebe Trussler. Denies all other allegations therein.

April 24, 1909, there was filed an agreed statement of facts signed by the attorneys of the respective parties, and the same was read in evidence by counsel for plaintiff on the trial of the cause (Printed Record, p. 27), in substance as follows:

1. Agreed that cause be submitted to the court —jury trial waived—and tried upon the pleadings and following facts:

2. Minnie Solander was a citizen by blood of the Creek Tribe of Indians, duly enrolled and entitled to an allotment out of the lands of the Creek Nation.

3. Died intestate October 8, 1899.

4. Left her husband, George, and child, Hattie, and sister, Phoebe.

5. Hattie was the legitimate child of George and Minnie Solander.

6. They were married August 27, 1898, and lived together until her death.

7. He was "an intermarried white," not a citizen by blood of the Creek Nation of Indians, and not an adopted citizen.

8. Hattie was a Creek citizen by blood, and enrolled as of quarter Creek Indian blood.

9. She died intestate, without issue or husband, December 19, 1899.

10. She was the only child of said Minnie.

11. George Solander was the father of Hattie.

12. Phoebe Trussler was the only sister of Minnie, who left no brother or brothers surviving, nor descendants of brother or sister, and was enro. ed a citizen of said nation as a mixed-blood Indian.

13. George Solander and Phoebe Trussler selected, and caused to be allotted to the heirs of Minnie, the said 160 acres of land.

14. The principal chief of said nation issued an allotment deed for this land, in the name of the heirs of Minnie Solander, which was approved by the Secretary of the Interior.

15. Said George Solander was a resident of said nation and had been for a long time prior to the death of his said wife.

16. That he is a native-born citizen of the United States.

17. This Nation of Indians had a republican form of government with the three co-ordinate branches, the principal chief being the head of the executive, the national council the legislative, and District Courts and a Supreme Court the judicial, with a written constitution.

18. It had a written code of laws, and the following are set forth in full, as appears in the printed record at pages 28 and 29:

> "Sections 76 and 77 relate to the jurisdiction of 'Non-Citizens Intermarried Courts,' of controversies over property acquired by intermarried citizens in the nation, and property brought into the nation by them."
>
> "Section 6 provides that if any person die intestate having property and children, the property shall be equally divided among them by disinterested persons, and in all cases where there are no children, the nearest relation shall inherit the property."
>
> "Section 8 provides that the lawful or acknowledged wife of a deceased husband shall be entitled to one-half the estate, if there are no heirs, and an heir's part if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner."
>
> "Section 1 provides that all non-citizens not adopted and married to citzens of the nation or having children entitled to citizenship shall have the right to live in this nation and enjoy all privileges enjoyed by other citizens, *except in participation in the annuities and final distribution of the lands.*"

19. Recites "that the above laws were duly enacted and put in force by the National Creek Council prior to the deaths of Minnie and Hattie Solander and were in force and effect at that time."

22. Recites that either party may introduce in evidence further proof of Creek laws and decisions contained in McKellop's and Perryman's Compilations, and copies of decisions of the Creek Supreme Court relating to the rules of descent in the Creek Nation, subject to objection as to materiality and relevancy.

The defendant read in evidence from Perryman's Compilation of laws of the Muscogee Nation of March 1, 189.. [0] the following:

> "*Doubtful Citizenship,* Section 1. All persons having resided out of the limits of the Muscogee Nation, whose rights to citizenship seem to be questionable in consequence of intermarriage with non-citizens, shall be *bona fide* citzens of this nation, provided they can prove to the satisfaction of the proper authorities that they are of Muscogee descent and not removed further than the fourth degree."

Objection by plaintiff on the ground that it is immaterial and irrelevant. Objection overruled, exception by plaintiff. The section was read in evidence.

Section 2 was read in evidence without objection, which provides that all persons who may have been adopted by the authority of the Muscogee Nation, all persons of African descent made citizens under the treaty of June, 1866, between the nation and the United States, shall be recognized as citizens of this Muscogee Nation.

"Sec. 1, Art. 3, Chap. 7: All non-citizens not previously adopted, and being married to citizens of this natior, or having children entitled to citizenship, shall have the right to live in this nation and enjoy all the privileges enjoyed by other citizens, *except participation in the annuities and final participation in the lands*, and in case of removal from the limits of our nation shall not have the right to sell their improvements, provided that such person shall satisfy the principal chief as to their good character and honest intention, and provided, that the principal chief shall grant to such person permit to reside in the nation during good behavior."

Then follows (Printed Record, pp. 30-31) a number of sections under the head of "Rights and Disabilities of Non-Citizens," but not pertaining directly to the acquisition of property by inheritance, and are only to be taken as circumstantial evidence showing the rigidity of the Creek law as to the non-citizen in this nation.

From page 110, Perryman's Compilation, first section, headed "Acts of 1882" (Printed Record, p. 31), appears the following:

> "*Be It Enacted by the National Council of the Muscogee Nation:* That after the passage of this bill, no permits to enjoy the rights of citizenship *shall be granted to non-citizens on account of intermarriage with citizens of the Muscogee Nation.*" (Approved Oct. 5, 1882.)

Then follow a series of acts of the National Council which were read in evidence (Printed Record, p. 32), showing the restrictions as to non-citizens' rights and privileges in the nation. Approved October 24, 1884.

Under the head of "Civil Laws Approved October 12, 1867," appears, on page 32 of said compilation (Printed Record, p. 32), the following:

> "*Be It Further Enacted:* That if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons; and in all cases where there are no children, the nearest relation shall inherit the property."

This being the same that is shown on page 29 of Printed Record as section 6, but the date of its adoption is not there shown.

There was read in evidence by defendant, from McKellop's Compilation, page 101, chapter 19, section 293, under the head of "Census," the following:

> "If it shall appear upon a fair investigation that any non-citizen has been enrolled as a citizen, and in consequence thereof, has received any money or its equivalent from the Muscogee Nation, the Kings and Warriors of such town wherein such non-citizen has been counted, shall be liable to the Muscogee Nation for the amount paid to such non-citizen."

Chapter 21, section 295, page 106 of said compilation provides,

"that persons born or who may be born without the limits of the Indian Territory and may have been entitled to citizenship because of Indian blood or tribal adoption, and who have continuously resided beyond or outside of the jurisdictional limits of the Muscogee Nation for 21 years, are hereby *declared aliens* and not entitled to citizenship in the Muscogee Nation, or to any of the privileges thereof."

"Sec. 296: The minor children and descendants of persons so debarred from citizenship and declared aliens, are hereby also excluded from citizenship in the Muscogee Nation and from all the privileges thereof."

"Sec. 298: This act shall not apply to persons who heretofore filed application for citizenship and whose cases are now pending." (Approved October 26, 1889.)

Chapter 22, page 106, under the head "Non-Citizens":

"Sec. 299. No non-citizen, on account of marriage with a citizen of this nation, shall acquire any rights pertaining or belonging to a citizen of this nation."

"Sec. 300. No non-citizen shall have the right to reside in or to own any improvements in this nation, except as provided for in the treaties between this nation and the United States." (Approved October, 1892.)

The foregoing statement embraces all the facts appearing in the record, and the only facts which the trial court could consider, unless it were facts

that might have been considered as judicial facts or knowledge, and from the findings of the court, which appear in its opinion, preceding the formal judgment (Rec., pp. 33-34.) But the judgment is based upon the following paragraph of its opinion:

> "The court finds from the statement of facts that the Creek law at the time of the death of Minnie Solander, was to the effect that the allotment of the lands, to which she was entitled, went to George Solander, her husband, and to her child, Hattie L. Solander, whether by descent or by purchase, it is not necessary to decide."

This was an exact following of the decision of the Supreme Court of the state in the case of *de Graffenried* v. *Iowa Land and Trust Company*, 20 Oklahoma Reports, rendered in 1908, upon the identical question involved in this case. The Supreme Court of Oklahoma, in the decision of this case, based it upon the same proposition, in effect, as did the trial court as appears from the opinion set forth in full in the printed record herein, as follows, page 52 thereof:

> "We think under the law and the decisions of this court, that the contentions of the plaintiff are correct. That the non-citizen husband would take an heir's part under the Creek law of descent, has been held by this court, upon exhaustive and satisfactory reasoning. In *de Graffenried* v. *Iowa L. & T. Co.*, 20 Okla. 711, it is said: 'When, in the Original Agreement, the Creek people said that the allotments made

thereunder should descend under the laws of descent and distribution of the Creek Nation, it necessarily follows that they meant that therein the intermarried *non-citizen* husband should receive out of his citizen wife's allotment an heir's part, etc.'

"That an allotment, under circumstances similar to the ones here, would go to the heirs on the death of the Indian entitled to the allotment, has been held in *Barnett* v. *Way*, and *Brady* v. *Sizemore*, and *Morley* v. *Fewell* ... Okla. ... (not officially reported)."

ASSIGNMENTS OF ERROR ON WRIT OF ERROR TO THE STATE COURT.

1. The Supreme Court of the State of Oklahoma erred in adjudging, on the agreed statement of facts, evidence produced and received on the trial, and the statutes of the United States relating to allotment in severalty of the lands of the Creek Tribe of Indians, among the enrolled members of that tribe, and the descent of the same where the one entitled to allotment should die before receiving allotment as provided by section 28 of the Act of Congress entitled "An Act to Ratify and Confirm An Agreement With the Creek Tribe of Indians" (31 S. L. 861), that defendant in error was owner in fee simple and entitled to the immediate possession of the 160 acres of land in dispute herein, and should have writ of possession therefor by virtue of conveyance made to him by a non-citizen of said tribe and surviving husband of a citizen by blood of said tribe, entitled to an allotment but died before having received it, and which was afterward selected, allotted and conveyed by patent from the Creek Nation to the heirs of said deceased citizen without further description, said husband claiming title under the Creek law of descent, and also as father of a deceased daughter of said wife by said husband, who also had died before the selection of said allotment, as against the plaintiff in error's

present possession and claim of title, by absolute deed of conveyance from a sister of said deceased wife of the same blood with her and nearest of kin surviving her when said allotment was made, enrolled as a citizen of said tribe and entitled to an allotment of said public lands.

2. It erred in not reversing the judgment of the trial court, and in adjudging in favor of the plaintiff in error.

ARGUMENT OF PLAINTIFF IN ERROR.

The sole question in this case is:

Can a non-citizen of the Creek Nation of Indians inherit, or have allotted to him, any portion of the public domain of this tribe of Indians, situate in what was the late Indian Territory, under the Act of Congress of June 30, 1898, known as the "Curtis Bill," and the Act of Congress of March 1, 1901, known as the "Original Creek Agreement"?

It is to be taken that there was a Creek law of descent and distribution in existence at the time of making the allotment in question, susceptible of proof, whereby the 160 acres of Creek public lands which Minnie Solander was entitled to receive, but died before receiving, should be allotted to her heirs.

The portion of section 21 of the "Curtis Act" of June 28, 1898, which provides for the allotment of the lands of the Creek Nation, is as follows:

> "Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes [the enrollment of the Cherokees being prescribed by the preceding part of this section 21], eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such *intermarried white persons as may be entitled to*

Choctaw and Chickasaw citizenship under the treaties and laws of said tribes."

It is the contention of the plaintiff, supported by the decisions of the Supreme Court of Oklahoma, that the Creek law of descent as prescribed in said section 28 of the Creek Agreement of March 1, 1901, is that expressed plainly in sections 6 and 8—the laws of the Creek Nation—admitted to have been in force at the time of the deaths of Minnie and Hattie Solander. Said section 6 appears to have been approved October 12, 1867 (Printed Record, p. 32). Both sections appear in Perryman's Compilation published in 1890. While there was read from McKellop's Compilation, of a later date (Printed Record, p. 33), the following:

"Sec. 299. No non-citizen, on account of marriage with a citizen of this nation, shall acquire any rights pertaining or belonging to a citizen of this nation."

"Section 300. No non-citizen shall have the right to reside in or to own any improvements in this nation, except as provided for in the treaties between this nation and the United States." (Approved October, 1892.)

The said last named two sections are in harmony with Article 3, chapter 7, section 1 of Perryman's Compilation:

"All non-citizens, not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have the right to live in this nation and enjoy

all the privileges enjoyed by other citizens, *except participation in the annuities and final participation in the lands*, and in case of removal from the limits of our nation, shall not have the right to sell their improvements."

This is a clear and positive provision of the statute barring a non-citizen intermarried to a citizen from final participation in the lands. This was a law prior to the publication of Perryman's Compilation which was in *189..*, (see Rec., p. 28), which must be presumed to have been during the 90's, and presumptively before October, 1892, the date of the act providing that "*no non-citizen, on account of marriage with a citizen of this nation, shall acquire any rights pertaining or belonging to a citizen of this nation.*"

Can there be any doubt left in the mind of anyone having a knowledge of the relations of the Indians and white man in the Indian Territory from the time of the occupancy of it, and from these somewhat obscure and inconsistent laws set forth in this record, that it was the intention of both parties to this agreement of March 1, 1901, that the non-citizen—the alien—should not inherit any of the tribal funds and tribal lands, and the word "heirs," as used in section 28 therein, did not include the intermarried white non-citizen, or any other person, of any other race, color, or condition—a non-citizen.

Even in the absence of these specific acts of exclusion of the non-citizen, decisions of this honor-

able court, and treaties with the Indians, the proposition stands out in language so plain that no one can misunderstand that in all contracts and transactions with the Indian he shall be classed as an incompetent to deal at "arms' length" with the white man, and therefore the ward of the United States, to be protected by it as all wards of guardians are to be protected under the rules of equity and good conscience. That all contracts and treaties, especially where the general government and the Indians are parties, shall be construed favorably for the Indians, and the language used therein shall be taken as the Indians shall be presumed to have understood it. All rules of technical construction must be ignored, if, in their application, the Indian shall suffer thereby.

This more manifestly appears in this agreement of March 1, 1901, than in any other of the agreements of the other four civilized tribes, which provide that in cases of allotments like those under consideration they shall descend according to the Arkansas law of descent. And there is cause to believe that it was the desire and purpose of the United States that that same rule of descent should be in the agreement and Act of March 1, 1901, but there had been much difficulty in getting the Creek Tribe to consent to any law of allotment, and we assume, from all the facts appearing expressly in this record and the several Acts of Congress subsequently and shortly after this Act of March 1, 1901, that the

Creek Tribe's contention that their tribal rule of descent should prevail, did prevail, by barring all non-citizens from sharing in its lands and funds.

At the first session of Congress after the adoption of the said act, May 27, 1902, there was injected into the Indian Appropriation bill under the head of "Miscellaneous" (S. L., p. 32), the following:

> "That the act entitled 'An Act to Ratify and Confirm An Agreement With the Muscogee or Creek Tribe of Indians, and for Other Purposes,' approved March 1, 1901, so far as it provides for descent and distribution according to the laws of the Creek Nation, is hereby repealed and the descent and distribution of lands and moneys provided for in said act shall be in accordance with the provisions of chapter 49 of Mansfield's Digest of the Statutes of Arkansas, in force in the Indian Territory."

By joint resolution, passed at same session, the said act did not go into effect until July 1, following (S. L. 32, p. 258). In the meantime, June 30, 1902 (S. L. 32, p. 500), there was passed "An Act to Ratify and Confirm a Supplemental Agreement With the Creek Tribe of Indians, and for Other Purposes," containing the following preamble:

> "The following supplemental agreement, submitted by certain commissioners of the Creek Tribe of Indians, as herein amended, is hereby ratified and confirmed on the part of the United States and the same shall be in full force and effect if ratified by the Creek Tribal Coun-

cil on or before the first day of September, 1902, which said supplemental agreement is as follows:

"This agreement by and between the United States, entered into on its behalf by the Commission to the Five Civilized Tribes, * * * duly appointed and authorized thereunto, and the Muscogee (or Creek) Tribe of Indians, in Indian Territory, entered into on behalf of said tribe by Pleasant Porter, Principal Chief, Roley McIntosh, Thomas W. Perryman, Amos McIntosh and David M. Hodge, Commissioners, duly appointed and authorized, thereunto, *witnesseth*, that in consideration of the mutual undertaking herein contained, it is agreed as follows:

* * * * * * *

"*6.* The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in the Indian Territory: *Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation. And provided further,* that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49."

It cannot be said that this apparently arbitrary repeal of the rule of descent agreed upon by the United States and the Creek Nation, in the "Original Agreement," was beyond its power; at any rate, the ground for discussion was removed by section six of the Supplemental Agreement made the day before the Act of May 27th went into effect establishing the law of descent of Arkansas, adopted by Congress in 1890, thereby removing all uncertainty, if any, of the Creek law, by abrogating it, and giving the Creek Nation the desired law that no non-citizen should inherit any of the tribal lands except to avoid an escheat to the state.

The construction of this law as applicable to the conditions existing in the Creek Nation we believe was put at rest by the decision of the Circuit Court of Appeals of Eighth Circuit in the case of *Shulthis* v. *McDougal,* 170 Fed. 529, that the descent should be *per stirpes,* in the line of the Creek blood.

It would appear unnecessary to longer dwell on this branch of the subject for really there is no conflict of law as to this matter of descent of the allotment in question.

It is agreed that said sections 6 and 8 of the Creek law of descent was in force at the deaths of Minnie Solander and her daughter, and, taken alone, and letter for letter and word for word and their exact meaning, it would sustain the contention of the plaintiff and the construction given it and fol-

lowed by the courts below, which decided that the non-citizen, George Solander, being the husband of the said Minnie, was her heir, and thereby inherited one-half of the 160 acres, and Hattie, the daughter, the other half, under Sec. 8, and, upon the death of Hattie, her father, being nearest relation, inherited her share under Sec. 6. To so decide was easy. On the other hand, defendant insists that the circumstances of this case authorize, and require, not an *interpretation* of these two sections, for that is the art of finding out the true sense of any form of words, which seems to have been the rule adopted by the courts below, but that a broader rule should be adopted, and that is the rule of *construction*, which is the drawing of conclusions from subjects germane to the text but lie beyond it.

> "Interpretation only takes place if the text conveys some meaning or other. But construction is resorted to when, in comparing two different writings of the same individual, or two different enactments of the same legislative body, there is found contradiction, when there was evidently no intention of such contradiction one of another."
>
> Cooley's Con. Lim., 49-50;
>
> Endlich's Interpretation of Stat., Sec. 1.

Without assuming that the court will take judicial notice of the Creek law of descent, during the period of the transactions concerning the allotment in dispute, there is enough in this record to show

that sections 6 and 8, aforesaid, were adopted long before any action of the United States was taken or indicating the dissolution of the Five Civilized Nations, and the allotment of the lands thereof in severalty among the members thereof, and to make them citizens of the United States. These lands were then communal, and the only interest or right of the individuals was that of occupancy, the right to put improvements upon the land, and to remove them upon leaving, or to sell them to a newcomer. The inheritance of real estate was unknown to these Indians, except it might be in the abstract. Hence, it must be taken that said sections 6 and 8 had no application to descent of *lands*, and while its first attempt to make them applicable to an allotment was the provision in section 28 of the Act of March 1, 1901, manifestly not introduced therein upon the part of the United States, but by the Creek Nation in its desire to have a law, as it believed, would bar the non-citizen from sharing in the allotment of the tribal lands directly or indirectly, because of the subsequent acts expressly excluding the non-citizen, the United States, following the well known rule established in the construction of its treaties and agreements with the Indians that they should be construed as the Indian understood them, and applying this rule of construction where there is ambiguity or conflict of language in the several laws of the nation, they should be construed most favorably to the Indian as against the white man. We

submit that the strong evidence in this case that it was the intent to exclude the non-citizen from a share in the tribal lands by reason of intermarriage or otherwise, is contained in section 6 of the Supplemental Agreement, being the clear expression of intent of both parties that the same rule of descent should apply to descent of unallotted lands as well as allotted lands.

Applying the rules of construction of the common law to laws of descent, an alien cannot inherit, in the absence of an express provision therefor, for he has no inheritable blood. It is contrary to the laws of all nations to allow an alien to become owner in fee of the lands of a country not his own. It is a human trait to consider blood thicker than water. It is the law of self-preservation to exclude the stranger from a foothold upon the soil of the home country. The statutes of the Creek Nation manifest a like disposition and policy to be as strong as exhibited by any other nation of people. And while there does not appear any positive provision contained in sections 6 and 8, above set forth, against the descent of property to an alien, it is apparent from the tenor of all the statutes, when construed together, that the exception as to aliens—non-citizens—is implied. The words of a statute are not to be taken literally when it would lead to inconsistency, absurd consequences and injustice. The reason of the law in such cases should prevail over its letter. *U. S.* v. *Kirby*, 7 Wall. 482.

In *Hanger* v. *Abbott*, 6 Wall. 532, plaintiff in error was defendant below in an action of *assumpsit*. The plea was three years' statute of limitations of Arkansas. Replication that defendant was a resident of Arkansas and plaintiff was a resident of New Hampshire; that the three years had not run before Arkansas joined the rebellion whereby the federal courts were suspended in that state, barring plaintiff from bringing his action. Demurrer to replication, which was overruled and judgment for plaintiff. Judgment affirmed by the Supreme Court of the United States upon the ground that, while no exception was expressed in the statute suspending its operation in case of the closing of the federal courts by the rebellion, saying:

> "Exceptions not mentioned in the statutes sometimes have been admitted, and this court has held that the time which has elapsed while certain prior proceedings were suspended by appeal should be deducted as it appeared the injured party had no right in the meantime to demand his money and therefore his right of action had not accrued. *Montgomery* v. *Hermandy*, 12 Wheat. 129."

Section 2 of the ordinance of 1787 provided:

> "That the estates of both resident and non-resident proprietors, dying intestate, shall descend to and be distributed among their children, and the descendants of a deceased child, a grand child to take the share of their deceased parent in equal parts among them; and when there shall be no children, or descendants, then

in equal parts to the next of kin in equal degrees, among collaterals, the children of a deceased brother or sister of the intestate shall have in equal parts among them the deceased parent's share, and there shall in no case be a distinction between kindred of the whole and half-blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one third part of the personal estate; and this law, relative to descent and dower, shall remain in full force and effect until altered by the legislature of the district."

A non-citizen and alien claimed the right of inheritance under this law of descent of real estate, situate in that part of the Northwest Territory, which is now the State of Michigan. The case went to the Supreme Court of Michigan as *Crane* v. *Reeder*, 21 Mich. 24, 4 Am. Rep. 480. CAMPBELL, J., delivered the opinion of the court, in part as follows:

"It is claimed, however, under the ordinance of 1787 the intention existed to do away, in rules of inheritance, all questions of alienage, and that the policy of the government has always been to put aliens upon as good footing as citizens. But we have not been able to trace any such intention in the action of the United States. There has always been a policy aiming at inducing aliens to become citizens, but none which would render it indifferent to them whether they became citizens or not. On the contrary, there are no courts in this country which have enforced the disabilities of aliens who do not seek citizenship more uniformly than the courts of the United States. And the laws and treaties speak the same language.

> *"The only color for claiming such a construction for the words of the ordinance is because it does not say, when declaring the rules of descent, that the relatives must be citizens of the United States, and because it applies the same rules to the estates of 'resident and non-resident proprietors.' But probably there are very few statutes which undertake to mention specifically the citizenship of those who are to be affected by them. It is implied in all statutes that they shall be read in accordance with the recognized rules of interpretation and apply to such persons and things as fall naturally within their scope.* It is not customary in such acts to express such disabilities as should be implied and alienage has been recognized in all common law countries, and in most if not all other countries, as a disqualification to hold land in fee. Citizenship gave the same rights to residents and non-residents and the law did not require aliens to be included to satisfy its terms."

The court held the alien claimant could not inherit.

Another well-considered case, by the Supreme Court of Alabama, holds in the same line in *Donovan* v. *Pitcher*, 53 Ala. 411, 25 Am. Rep. 634.

In 1832 the legislature of that state passed an act prohibiting a free man of color from becoming a resident therein, and further provided that if he came into the state and remained thirty days he was guilty of felony and should be punished by imprisonment in the penitentiary. William Pitcher, who had been a slave there, had, by permission of his

master, become the owner in fee of real estate therein and had improved it. He was afterward given his freedom and moved to the State of Ohio in 1857, and died there, leaving a widow and children. The plaintiff in error, Donovan, purchased the land of the former owner, and went into actual possession. The heirs of Pitcher brought ejectment and recovered judgment in the court below, the instruction to the jury being:

> "That if the jury believe that William Pitcher was free at his death, the plaintiffs were entitled to the land by descent, notwithstanding they were free persons of color resident in Ohio; and if William went to Ohio with the assent of his master to live as a freeman, he became a freeman entitled to buy, own and inherit land."

The judgment of the trial court was reversed on the ground that the Act of 1832 by implication barred him from inheriting land in Alabama, because he could not take possession of it—he was barred from entering the state at the time of his decease which was equivalent to a prohibition against receiving real estate. And while the heirs of William might inherit land from him in Ohio, yet the doctrine of state comity would not be recognized when to do so would violate the public policy of Alabama and this policy was not within the inhibition of the Constitution of the United States, as the right or privilege of inheritance was a matter of state control solely, saying:

"The extension of comity in the violation of law and policy of the state would be the abdication of the law and sovereignty of the state, and the recognition of the superiority of and not the equality of the foreign state. Every state judges for itself, of the nature, extent and utility of the recognition of foreign laws, respecting the state and condition of persons, and is not bound to recognize them when prejudicial to their own interests"(citing Story on Conflict of Laws, Sec. 36).

The spirit as well as the letter of the statute must be respected, and *where the whole context of the law demonstrates a particular intent to effect a certain object, implication may be used to aid the intent.*

Durousseau v. *U. S.*, 6 Cranch. 307;
In re Ellis, 11 Cal. 222.

"A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter of the statute; and the thing which is within the letter is not within the statute unless it be within the meaning of the statute."

Suckley v. *Furse*, 15 Johns. 338;
People v. *Utica Ins. Co.*, 15 Johns. 357.

The case of *deGraffenried* v. *The Iowa Land & Trust Company et al., supra*, in which this Creek law of descent was construed, in 1908, and has since been followed in the State of Oklahoma, was submitted upon an agreed statement of fact, which in-

cluded an agreed statement of the law, for all that part of the statement which purported to give the Creek law of descent did not rise to the dignity of fact, but was merely the law of the case of which the court is presumed to have been fully advised. That which we have furnished from the Creek Statutes has been for the convenience of the court, and we believe the state of the case now presented is much more favorable to our contention than was the case just named, to the defendants therein. We have aimed to show the court how the Creek people, through their agreements of 1901 and 1902, intended and understood the tribal funds and tribal lands in the case of death and intestacy of an allottee should descend.

The decision in the *deGraffenried* case cannot be taken to have made an absolute rule of property in said state because it is but the first decision, and further, it does not construe and determine the application of a *state* statute of the devolution of real property, but is the construction of a statute of the United States fixing the descent of property at the time of the descent within the jurisdiction exclusively of the courts of the United States, and which is yet left open for final determination by the highest court of the land. In other words, the question is federal instead of state. There is not any positive law or rule of comity requiring the court to follow the Supreme Court of Oklahoma in construing United States statute.

We are aware of the high regard of the courts for the doctrine of *stare decisis*, but it is not absolute. The Supreme Court of Minnesota, in *Grimes* v. *Byrne*, 2 Minn. 80, says in regard to it:

> "No adjudicated case can be authority for another unless the facts in both cases are identical. The positive authority for a decision is co-extensive with the facts upon which it was made."

Mere precedent alone is not sufficient to establish a principle which is not founded on sound reason, and does not tend to the purposes of justice.

> *Leavitt* v. *Morrow*, 6 Ohio St. 71, 67 Am. Dec., with notes, 334.

A question not settled by positive legislation will not be considered settled by a single decision.

> *Smith* v. *Smith*, 13 La. 441;
> *State* v. *Williams*, 13 S. C. 546.

A decision by a state court as to the construction of an Act of Congress governing mining claims should not be followed if it is wrong, under the doctrine of *stare decisis*, or on the ground that it has become a settled rule of policy, when the construction of the statute has not been settled by the Supreme Court of the United States.

> *Calhoun Gold M. Co.* v. *Ajax Gold M. Co.*, 27 Colo. 1, 50 L. R. A. 209.

This being essentially an action of ejectment, as stated by the court of review in the court below,

followed by the recital of the universal principle applicable to such actions, "that the plaintiff must recover upon the strength of his own title and not upon the weakness of that of his adversary." In other words, the plaintiff must make out his right of recovery by clear and satisfactory proof. The defendant may remain in possession without any proof of his right to do so, in the absence of proof by plaintiff of his superior right of possession. As stated by said court in this same connection, "it shall be sufficient that plaintiff plead that he has an equitable or legal estate with the right of possession of same, and that defendant unlawfully keeps him out of it. It is not necessary to state how his estate is derived. The defendant need only allege title, or that he withholds possession. Thus making the case triable as at common law. Hence it must affirmatively appear upon the face of the record that plaintiff was entitled to the immediate possession of the 80 acres of said land described as possessed by defendant, at the commencement of this action. Does the face of the record affirmatively show his right to such judgment?

It may be possible, under the elastic procedure of Oklahoma, to unite in one action ejectment and for the removing of cloud from title, which seems was attempted in this case, but, as the record appears, neither the legal nor equitable relief could be granted. From any point of view the grantor of plaintiff was restricted from conveying one-half

of the 160-acre allotment on the 27th day of April, 1906, the date of this conveyance being within the five years' bar provided by section 16 of the Supplemental Agreement, whether he took by purchase or as an heir. This bar must be taken as an extension of the five years named in the Original Agreement and to terminate on the 8th day of August, 1908.

The judgment below was for *possession* and declaring title in plaintiff, and for costs, and nothing further.

Concede that Solander could take as the heir of an heir (of his daughter), thereby giving him title to one-half the allotment without the bar of said restriction thus making him the owner in fee of the whole 160 acres, yet there would be an undivided one-half (which he got from the nation by grant) under restriction. There is a specific half of this land only in controversy in this case. Could the court in this proceeding partition and by its fiat designate the portion occupied by defendant as the part without the bar and therefore free from the restriction?

The title of plaintiff, if any, is purely a legal one, and he has elected to try it as such and claim the right to the immediate possession to the whole and bases that right upon his deed from Solander, who was prohibited by the law from alienating an undivided half of that land, hence his deed, being

null, he has no right to demand possession to any part of said land. What right Solander might have to get possession of the land, as against defendant, is not in issue, yet the bar against alienation extends to and makes a bar to authorize another to do what the grantor could not do. The power is not assignable.

The title of the Creek Nation to its lands in the Indian Territory, under the grant from the United States, is the same as was that of a corporation at common law, being a fee with a possibility of reverter to the donor upon its dissolution. It was analogous to the devolution of title of an individual who, having land, dies without heirs and without disposing of it by will, it escheats to the state. Congress, however, to prevent the reversion to the United States, by Act of Congress approved by the Creek Nation, provided that upon the dissolution of the Creek Nation its lands, instead of reverting to the general government, should revert to the enrolled, recognized citizens of the nation, each citizen to have and to hold the title in fee simple in equal shares, the manifest purpose being to absolutely exclude non-citizens—aliens—from participation in these lands, whether in the disguise of "heir," "allottee," "grantee," or otherwise, except "that if there be no person of Creek citizenship to take the descent and distribution of said estate, *then* the inheritance shall go to *non-citizen heirs* [meaning those who would be heirs if they were *not* non-citizens], in the *order* named in said Chapter 49."

This is proof of the intent of both parties as to the course of the descent named in the 28th section of the Original Agreement, and it is most probable that they so understood and construed the Creek law of descent to absolutely exclude the non-citizen from inheritance or share in the tribal lands of the Creek Nation; at least it was so construed by the Indians; and both parties, to emphasize this intent, joined in making the Supplemental Agreement.

Respectfully submitted,

WILLIAM R. LAWRENCE,
Attorney for Plaintiff in Error.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 433.

JOHN T. REYNOLDS, - - - *Plaintiff in Error,*

vs.

WILLIAM M. FEWELL, - - - *Defendant in Error.*

---

and No. 434.

JOHN H. SHELLENBARGER, - *Plaintiff in Error,*

vs.

WILLIAM M. FEWELL, - - - *Defendant in Error.*

BRIEF *for* DEFENDANT *in* ERROR.

Statement.

The above styled and numbered cases involve an allotment in the Creek Nation made to the heirs of Minnie Solander, a Creek Indian, who died October 8, 1899, leaving her surviving as her only heirs George Solander, her husband, who is a non-citizen of the Creek Nation, but a citizen of the United States, and Hettie Solander, her daughter, who

was a citizen of said Creek Nation of Indians. Hettie Solander died about the 17th day of November, 1899, leaving her father, said George Solander, and also leaving an aunt, Phoebe Trusler, a citizen of the Creek Nation. The land was selected for and allotted to the heirs of Minnie Solander, deceased, on the 3rd day of December, 1901, under the provisions of Section 28 of the Supplemental Creek Agreement (33 Stat. L. 500). On the 7th day of September, 1905, said George Solander, claiming to be the heir and sole owner of said allotment, made an agricultural lease covering the same, and this is the instrument involved in the *Reynolds* case. On the 27th day of April, 1906, he executed a deed conveying the land, which conveyance is involved in the *Shellenbarger* case.

Since the defendant in error is the same in both cases and the same counsel represent the parties in the two cases, the facts are identical, and the law propositions the same, we have prepared and pray for leave to file in both cases one brief. The principal question involved is, Did George Solander, upon the foregoing facts, take said allotment under the Creek law which was in force from April 1, 1899, until July 1, 1902? If this question is answered in the affirmative, then the remaining question is, Were the lands alienable by said George Solander when said conveyances were made, the actions below by Fewell being in ejectment requiring him to recover upon the strength of his own title?

BRIEF *and* ARGUMENT.

Acts of Congress providing for Dissolution of Tribal Government, allotment of lands of the Creek Nation, and statutes governing descent of allotted lands.

Since March 1, 1889, the date of the establishment of a United States Court in the Indian Territory, Congress has enacted many laws for the purpose of allotting and distributing the lands and moneys of the Five Civilized Tribes to the respective members thereof, for the breaking up of the tribal relations, and to bring the Indians, as rapidly as was consistent with their welfare, upon the same plane as the white people, subjecting them, by a progressive series of acts, to the laws governing white people and their property, which acts taken as a whole show a new and progressive policy in dealing with the said tribes. The contentions upon behalf of plaintiff in error are not in accord with this progressive policy. By the act of May 2, 1890, the jurisdiction of the United States Court in the Indian Territory was enlarged, the act reserving, however, to the courts of the Five Tribes certain limited jurisdiction over cases arising wherein members of the tribes were the sole parties. The Act of Congress of March 1, 1895, still further enlarged the jurisdiction of the United States Court in the Indian Territory. The Act of Congress approved June 28, 1898 (30 Stat. L. 495), known as the orig-

inal Curtis Act, abolished all the tribal courts and tribal laws and subjected all citizens of the Five Civilized Tribes to the laws enacted by Congress for the Indian Territory and to the jurisdiction of the United States Courts in the Indian Territory. This act provided a scheme for the allotment of lands. It was the policy of Congress where it was possible to procure consent of the respective tribes to treaties providing for the allotment of their lands. In furtherance of this plan, in 1897, the Commission to the Five Civilized Tribes negotiated an agreement with the Creeks which was approved by Congress June 28, 1898, but which never became a law because it was not ratified by the Creek Nation. Section 1 of said Agreement which failed of ratification is as follows:

> "*1.* There shall be allotted out of the lands owned by the Muscogee or Creek Indians in the Indian Territory to each citizen of said nation one hundred and sixty acres of land. Each citizen shall have the right, so far as possible, to take his one hundred and sixty acres so as to include the improvements which belong to him, but such improvements shall not be estimated in the value fixed on his allotment, provided any citizen may take any land not already selected by another; but if such land, under actual cultivation, has on it any lawful improvements, he shall pay the owner of said improvements for same, the value to be fixed by the commission appraising the land. In the case of a minor child, allotment shall be selected for him by his father, mother, guardian, or the administrator having charge of his estate, pref-

erence being given in the order named, and shall not be sold during his minority. Allotments shall be selected for prisoners, convicts, and incompetents by some suitable person akin to them, and due care shall be taken that all persons entitled thereto shall have allotments made to them."

Although this agreement had not been ratified by the Creeks the Commission to the Five Civilized Tribes undertook to carry out the provisions of said rejected agreement and allot the lands of the tribe. A great many allotments were made under this agreement which failed to become a law. In 1900 the Commission to the Five Civilized Tribes negotiated another agreement with the Creeks which was approved by Congress March 1, 1901, ratified by the Creek Nation May 25, 1901, and became effective August 8th, 1902, upon proclamation thereof by the President, and is known as the Original Creek Agreement (31 Stat. L. 861). The general plan of allotment is set forth in Section 3 of said Original Creek Agreement, as follows:

"All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty

cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands of less than such standard value may, at any time, select other lands which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

If any citizen select lands, the appraised value of which, for any reason, is in excess of such standard value, the excess of value shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds of the tribe until all other citizens have received lands and money equal in value to his allotment. If any citizen select lands the appraised value of which is in excess of such standard value, he may pay the overplus in money, but if he fail to do so, the same shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds until all other citizens shall have received lands and funds equal in value to his allotment; and if there be not sufficient funds of the tribe to make the allotments of all other citizens of the tribe equal in value to his, then the surplus shall be a lien upon the rents and profits of his allotment until paid."

The allotments made prior to the Original Creek Agreement under the terms of the Creek Treaty which failed of ratification were confirmed by section 6 of said Original Creek Agreement, which is as follows:

"All allotments made to Creek citizens by said Commission, prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said Commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said Commission."

The first provision by Congress with reference to the Creek law of descent is found in Section 7 of the Original Creek Treaty, which is in the following words:

"Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided*, That selections of homesteads for minors, prisoners, con-

victs, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him.

The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs, *according to the laws of descent and distribution of the Creek Nation*, free from such limitation."

The Commission to the Five Civilized Tribes, acting under authority of the Secretary of the Interior, was required to allot the lands in severalty, to issue allotment certificates therefor, and to put the allottees in possession of their individual lands. Section 8 of the Original Creek Treaty provides:

"The Secretary of the Interior shall, through the United States Indian agent in said Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided, and receive certificate therefor, he shall be immediately thereupon so placed in possession of his land."

Section 23 of said Act of March 1, 1901, provided for deeds to the allottees:

"Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

The principal chief shall, in like manner and with like effect, execute and deliver to proper parties deeds of conveyance in all other cases herein provided for. All lands or town lots to be conveyed to any one person shall, so far as practicable, be included in one deed, and all deeds shall be executed free of charge.

All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his deed.

Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title, and interest in and to the same, except in the proceeds of lands reserved from allotment."

The scheme of allotment for the Creek Nation provided that all of the members of the Creek Tribe who were living on the first day of April, 1899, should constitute the *units* for the final distribution of the lands and funds of the tribe; that all the members of the tribe living on that date should be duly enrolled upon the final rolls of the tribe and none other. It was provided that if a member of the tribe had died after April 1, 1899, or should die after that date without enrollment, and without receiving his distributive share of the lands and funds of the tribe, that his name should be put upon the rolls and that *his* allotment and his part of the funds of the tribe should descend to his heirs so as to place his heirs exactly in the same position as they would have been had the allottee lived to take his allotment. Section 28 of the Act of March 1, 1901, provides:

> "No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.
>
> All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time,

or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made and to no other persons."

Section 5 of the Act of April 26, 1906 (34 Stat. L. 137), provides for the issuance of patents in the name of the original allottees to inure to the benefit of their heirs, as follows:

"That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee

shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

In section 46 of the Act of March 1, 1901, it is provided that the tribal government of the Creek Nation should not continue longer than March 4, 1906, subject to such further legislation as Congress might deem proper.

The Supplemental Creek Treaty, Act of Congress of June 30, 1902 (33 Stat. L. 500), at section 6 repealed the Creek law of descent found in sections 7 and 28, Original Creek Treaty, *supra*, in the following words:

> "The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation,

are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided,* That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And *provided further,* That if there be no person of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

This repeal was effective July 1, 1902, under a joint resolution of Congress of May 27, 1902.

The Creek law of descent and distribution had been abolished in 1898 together with all the other laws of the Creek Nation. The Creek statutes put in force by said sections 7 and 28 of the Original Creek Agreement are as follows:

"Be it further enacted, that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons, and all cases where there are no children the nearest relation shall inherit the property. Laws of the Muskogee Nation 1880, p. 132."

"The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no other heirs, and an heir's part if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner. Laws of Muskogee Nation 1880, p. 60."

These sections were statutes of distribution rather than descent, technically speaking, for the Creeks, prior to allotment, had no individual title to land but only such surface rights as they acquired by possession and improvement. Congress made the law of distribution a law of descent.

In connection with the foregoing statutes of descent and distribution, the lower court considered the following sections from the Creek laws, which, however, are not statutes of descent or distribution:

> "All non-citizens, not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have a right to live in this nation and enjoy all the privileges enjoyed by the citizens, except participation in the lands."
>
> —Acts 1890.

> "The courts of this nation shall have and exercise jurisdiction over all controversies arising out of or pertaining to property rights acquired in this nation, and situated in the same by non-citizens who have intermarried with citizens of this nation and by reason of such marriage secured rights and privileges in this nation under which such property was acquired and accumulated by them. The jurisdiction of our courts shall extend to controversies over property and property rights acquired by intermarried non-citizens of our nation who by virtue of this intermarriage with citizens, acquired such property rights and privileges and that irrespective of whether such controversies are between non-citizens and citizens of the

Muskogee Nation or between any persons whomsoever, who claim in this nation property rights under and through such intermarried non-citizens which are by them acquired in the manner aforesaid; and all persons hereafter intermarrying with citizens of this nation shall thereby be deemed to consent that the courts of this nation exercise all jurisdiction over all property rights and privileges that they acquire in this nation by virtue of their said marriage.

All property brought into this nation by non-citizens in consequence of intermarriage of such non-citizens with citizens of this nation shall likewise be under the jurisdiction of the courts of this nation.

Approved April 6, 1894."

Commencing with the Act of Congress of March 3, 1893 (27 Stat. L. 612), Congress inaugurated a new policy for the Five Civilized Tribes. However, the policy of isolation from surrounding country applied to reservation Indians was never characteristic of the government's policy in dealing with the Five Civilized Tribes. In 1890 there were 180,182 persons residing in the Indian Territory of whom only 51,279 were Indians. In 1900 the population of the Indian Territory had increased to 392,000, of which number 52,500 were Indians. The government commenced to plan for a new state and encouraged white people from the surrounding states to settle in the Indian Territory. This new policy of Congress was ever more progressive, always seeking to hasten the time when the five tribal gov-

ernments would be abolished, their laws, customs and courts become a mere matter of history, when the Indians would be in the new state exactly in the same situation as the white people. This progressive policy has been so enlarged that there is now nothing left of the tribal governments except mere empty shells—names, as it were, only. There is nothing now left of the government's guardianship over Indian matters in the former Indian Territory except in the matter of certain restrictions for a limited period upon comparatively small parts of the allotments still in the hands of the original allottees. It must be admitted that now and then in the course of this legislation there has been a backward step. But this has interfered in no way with the rapid progression of the movement to settle completely for all time the Indian question in the Five Civilized Tribes. One of the world's greatest philosophers has said, in effect, that every forward movement progresses by a sort of circular method, each circle progressing further and larger than its predecessor,and in its backward movement intersecting the path behind it. In construing an Act of Congress relating to the closing of the affairs of the Five Civilized Tribes, the intent of Congress can not be found by looking merely at a retrogressive step, but the true intent is discovered rather in the general and progressive and forward movement of the entire legislation as a whole. For the purposes of construction plaintiff in error di-

rects attention only to such sections of the various Acts of Congress as seem to indicate a retrogressive policy—calls, as it were, to the past—ignoring the great body of the legislation, forgetting that every such backward step has been speedily retraced with the result that the government *advanced in a still larger and more liberal policy*, more and more clearly indicating the intention to make all citizens of the Indian Territory alike as soon as possible in respect to their property rights, as well as in matters political.

The Creek Nation responded with considerable readiness to this new policy of Congress. This dependent nation established in this territory in 1833, had a written constitution, written laws, a government organized after the fashion of our own, the legislative branch thereof being composed of the House of Kings and House of Warriors, corresponding to our Senate and House of Representatives; a Principal Chief, corresponding to our chief executive; a Supreme Court, with jurisdiction very similar to that of our own. But the tribal authorities readily consented to the dissolution of their tribal government, agreeing to abolish their constitution, all of their laws, their legislative body and their courts. The policy of exclusion of non-citizens of the Creek Nation which, however, had never applied to intermarried whites (and of such class is the non-citizen herein involved), gave way under the influences of the government, as evidenced by

the Creek statute above quoted enacted in 1890, providing that *all non-citizens not adopted or married to citizens of the nation or not having children entitled to citizenship,* should have the right to live in the Creek Nation and enjoy the privileges to which other citizens were entitled, excepting only the participation in the annuities of the tribe and in the final distribution of the lands. This more liberal policy is manifested in clearer fashion by the act of Creek Council of April 6, 1894, quoted by the Supreme Court of Oklahoma in the case of *deGraffenreid* v. *Iowa Land & Trust Company,* 95 Pac. 627, 20 Okla. 687, which provides in the broadest terms that non-citizens of the Creek Nation should have all the rights of the citizens of the tribe *which would include the right of inheritance,* barring such non-citizens only from the tribal right of each enrolled citizen to participate in the final distribution of the lands as a unit of such distribution. There had been many intermarriages between the Indians and the white people, many children of the mixed-blood had been born the issue of these marriages. The Creeks agreed that all such of the mixed-blood of however remote degree of Indian blood, should be enrolled upon the final rolls of the tribe to share equally with other members of the tribe in the lands and funds belonging to the tribe. Under such changed conditions the old Creek statutes of exclusion relating to non-citizens, quoted in the brief of plaintiff in error, can have no possible application. The

right of inheritance being one of the privileges enjoyed by citizens of the Creek Nation, was necessarily conferred upon all non-citizens in the tribal domain by the foregoing Creek statutes conferring upon such residents *all rights* of the tribe except the right to participate in the final distribution of the common property. But long before allotment was thought of the Creek Nation had adopted a liberal policy toward intermarried whites who because of their intermarriage were placed upon a different plane from other non-citizens. In the compilation of Creek laws, published in 1890 by L. C. Perryman, which is the only authorized edition of the Creek laws, we find, under article 4 and the caption "Rights and Disabilities of Non-citizens," the following two sections:

> "*Section 1.* No non-citizen shall have a right to reside in or to own any kind of property within the Muskogee Nation, except by permit, and any non-citizen, without a permit, who shall make any improvements within the Muskogee Nation shall forfeit the same to the nation.
>
> *Sec. 2.* This article shall not be construed so as to interfere with persons who are intermarried with citizens of the Muskogee Nation, or so as to interfere with any rights guaranteed by treaty."

We find under the caption "Traders," at article 5 of the same compilation, the three following sections:

"*Section 1.* All persons who carry on any business transaction within the limits of this nation, under license from the United States Government, shall be required to pay the sum of one hundred dollars per annum into the national treasury of this nation, and it shall be the duty of the Light Horse captains to collect the same.

Sec. 2. No non-citizen licensed trader, who has not intermarried with a citizen of this nation, shall be allowed to inclose more than two acres of our public domain, nor be allowed to cut and put up hay from our common pasturage, and any non-citizen, not intermarried, licensed trader, found cutting and putting up hay from the common pasturage, shall be fined ten dollars per acre, for each acre so cut and put up.

Sec. 3. No non-citizen, not intermarried, licensed trader, shall be allowed to keep stock ranches nor permanent herds of cattle within the limits of this nation and any licensed trader of this class, who shall disobey this provision, shall be reported to the United States agent, by the district attorney in whose district the trader is doing business, with the request that said person's license be revoked, and that they be removed from the limits of the Muskogee Nation."

Under the foregoing laws it must appear at once that the rights of intermarried non-citizens were different and much greater than the rights of non-citizens not intermarried.

The above quoted sections, the one from the Creek laws of 1890, and the other from the laws of

1894, which we will call for brief expression the Creek statutes of exclusion from final distribution in the lands, are not statutes of descent or distribution in any sense, and the same were absolutely and forever abrogated, as hereinbefore set forth, in the year 1898. When Congress put the Creek law of descent in force in the acts above cited, there was merely re-enacted the two sections of the Creek law referred to as sections 6 and 8, *supra*. These two sections constitute the entire law of Creek descent. For the purpose of showing that there were no other Creek statutes of descent, we quote chapter 10, in full, Perryman's Compilation Constitution and Laws of Muskogee Nation, 1890, the same being styled: "Administration of Property."

> "*Section 1.* When any male citizen of this nation shall die without having made a will, it shall be the duty of the judge of the district wherein such deceased person may have resided, to grant letters of administration to any citizen of this nation who may request the same, and such person shall be required to give bond in double the value of such estate, with at least two good securities, each of whom shall also own property equal to twice the value of such estate.
>
> *Sec. 2.* All estates of deceased persons shall be valued by the judge and two disinterested persons.
>
> *Sec. 3.* The administrator shall, at all times, be required to make and provide liberal means for the support and education of all heirs of the deceased, to make any trade that

may be of advantage to such estate, and to advise and direct the affairs of such heirs until they shall have become of age, according to the laws of this nation, or until such heirs shall marry, in which event the administrator shall turn over to such heirs of his or her inheritance everything connected with the estate that may have been placed in his care, or its equivalent in money or other property.

Sec. 4. If an administrator, when required to do so, fails to turn over everything connected with an estate of which he shall have had charge, or its equivalent in money or other property, the proper authority shall seize the goods or property of his securities, and appropriate therefrom sufficient to make up any deficiency that may occur in the value of the estate; and if any person shall sign a bond as security, and afterwards die, the estate of such security shall in all cases be held responsible.

Sec. 5. When no person shall ask letters of administration, it shall become the duty of the judge to appoint a suitable person, who upon giving sufficient bond and security shall act as administrator.

Sec. 6. In case of the death of a female, if there be a husband and children living, he shall have the preference of administratorship, and in the event of there being no children living, the nearest relative shall have preference.

Sec. 7. The administrator or administratrix of an estate shall be entitled to twenty-five per cent of every dollar's worth of such estate that may be rendered at the expiration of such administration.

Sec. 8. The lawful or acknowledged wife of a deceased husband shall be entitled to one-

half of the estate, if there are no other heirs, and an heir's part, if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner.

Sec. 9. The homestead and household and kitchen furniture, one work-horse, one cow and calf, and one breeding sow, shall be exempt from seizure or forced sale for any debt.

Sec. 10. Provided that an estate is solvent, the administrator shall settle up and cancel all debts and accounts against the estate out of the estate's effects."

The two sections of the Creek law above quoted which we style the statutes of exclusion from participation in the lands, do not appear in any of the Creek laws as statutes of descent, but under the heading "Non-citizens." Congress could not have revived these sections relating to non-citizens merely by re-enacting the Creek statutes of descent and distribution. Nor should these statutes of exclusion from participation in the lands be looked to even for the purposes of construction of the Creek laws of descent, for the spirit and situation of the Creek Nation had so changed that the Creek statutes abolished in 1898 cannot be looked to in determining the intention of the Creek legislature in the matter of their statutes controlling the devolution of property. When the question here involved was first reached by the Supreme Court of Oklahoma in the *deGraffenreid* case, *supra,* the state court adopted this view, saying:

"But it would seem that the Act of April 6, 1894, shows a recognition of certain rights theretofore acquired by intermarried citizens. In part, it says: 'The jurisdiction of our courts shall extend to controversies over property and property rights acquired by intermarried non-citizens of our nation, who, by virtue of this intermarriage with citizens, acquired such property rights and privileges,' * * * and would seem to refer to the act of the Creek Council, set forth in the Compilation of 1890 (page 66), *supra*: '*Sec. 1.* All non-citizens, not previously adopted, and being married to citizens of this nation, or having children entitled to citizenship, shall have the right to live in this nation and enjoy all privileges enjoyed by other citizens, except participation in the annuities and final participation in the lands.' Now, whatever might have been within the purview of the Creek Council at the time of the enactment of sections 6 and 8 of their statutes of descent and distribution, this section 1, perhaps, and of necessity the Act of April 6, 1894, *supra*, was enacted in view of fast approaching allotment, and gives, without reserve, to the intermarried non-citizen, 'all privileges enjoyed by other citizens, except participation in the annuities and final participation in the lands.' This act was intended to and did extend to the intermarried non-citizen the right to inherit under tribal law, and put him on the same footing, under that law, with all other citizens, except, as so aptly expressed by the learned judge of the United States Court for the Western District of the Indian Territory in the case of *Edward Porter et al.* v. *Eck E. Brook*, 'that he shall not be counted in making up the great

fraction which shall express what share of the soil shall belong to each citizen; that is, he shall not receive an allotment'."

In the case of *Leak Glove Mfg. Co.* v. *Needles*, 69 Fed. Rep. p. 69, the Circuit Court of Appeals for the Eighth Circuit held that where a statute at one time in force in the State of Arkansas had been extended by Congress over the Indian Territory, that the same should be considered just as if Congress had passed an act in the exact words of the Arkansas statute. On this point, then, the situation is, as regards the Creek law of descent, the same as if Congress had merely enacted the two following sections:

"*Sec. 6.* Be it further enacted that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons and in all cases where there are no children, the nearest relation shall inherit the property."

"*Sec. 8.* The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate, if there are no heirs, and an heir's part if there should be other heirs in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner."

But if said sections intended to exclude non-citizens from participating in the final allotment were to be considered as affecting the said Creek statutes of descent and distribution, they would foreclose the contention of the plaintiff in error,

for by their express terms they provide *that all non-citizens not previously adopted, being married to citizens of the Creek Nation, shall have all the rights of citizens of the nation (which includes the right of inheritance from citizens of the Creek Nation) and to enjoy all the privileges enjoyed by citizens of the Creek Nation except participation in the final distribution of the lands.* This clearly shows that by the Creek law a non-citizen of the Creek Nation acquired *property rights and property privileges.* What other kind of rights could a non-citizen acquire by intermarriage? This act of the National Council of the Creek Nation of 1894 clearly concedes that under the law then existing a non-citizen, intermarried to a Creek, acquired "property rights and privileges." The only property rights a non-citizen could acquire by intermarriage would be the right of inheritance—the right to take property by descent. This was in accord with the natural order of things, because the surviving spouse was charged with the maintenance of the children, the issue of the marriage, and as such should be given the dignity and capacity suitable to the protector of such offspring. In this consideration the right of curtesy had its origin.

The Supreme Court of the Creek Nation, in the case of *Gibson* v. *Davidson*, decided by the Supreme Court of that nation in 1893, set the point under discussion at rest. At that time the courts of the Creek Nation had no jurisdiction over con-

troversies between citizens of the Creek Nation and citizens of the United States. The *Gibson* case finally reached the United States Courts, and a statement of the facts involved will be found in the opinion of the Circuit Court of Appeals reported in 56 Fed. Rep. 443, 5 C. C. A. 543. Julia Gibson, the wife of Edward Gibson, died in April, 1891. The Creek Supreme Court held that the courts of the Creek Nation had no jurisdiction of the controversy upon the ground that the non-citizen husband took Creek property under the foregoing Creek statutes *as heir of his wife.* This decision of the Supreme Court of the Creek Nation is squarely in point. It is not an ordinary case where the court refuses to pass upon the merits for lack of jurisdiction. That court had to decide, first of all, whether the non-citizen husband inherited from his wife, for if he did so inherit then in that event the courts of the Creek Nation under the Creek statutes would not have jurisdiction to determine the controversy. This authoritative construction of the Creek law of descent whereby the non-citizen husband was permitted to inherit from his wife was regarded by the Supreme Court of Oklahoma, in the *deGraffenreid* case, *supra*, as very persuasive, if not conclusive, the court saying:

> "The opinion of the Supreme Court of the Creek Nation in that case, 'relative to Edward Gibson, finds that he is not a *bona fide* citizen of the M. N. (Muskogee Nation), and simply entitled to his own property, and an heir's part

of the Julia Gibson estate; and therefore, dismiss the case for want of jurisdiction of Edward Gibson.' This controversy, to be sure, was over personal property, but the construction was made by that court in the face of impending allotment, which came shortly following the creation of the Dawes Commission in 1893, and was, no doubt, made with full knowledge of its far-reaching effect. And, furthermore, when in the 'Original Agreement' the Creek people said that the allotments made thereunder should descend under the laws of descent and distribution of the Creek Nation, it necessarily follows that they meant that therein the intermarried non-citizen husband should receive out of his citizen wife's allotment an heir's part under section 1, *supra*, pursuant to the ruling of the Supreme Court of the tribe in the *Gibson* case. It is well settled that: '• • • Whenever Congress in legislating for the District of Columbia or the territories has borrowed from the statutes of a state provisions which had received in that state a known and settled construction before their enactment by Congress, that construction must be deemed to have been adopted by courts together with the text which it expounded, and the provisions must be construed as they were understood at the time in the state.' 26 Am. & Eng. Enc. of Law, p. 702. And as there is no reason why the laws of the Creek Nation and the decisions of its Supreme Court should be placed upon a different footing from those of any other state or territory of the Union (*Mackey et al.* v. *Cox*, 18 How. 100, 15 L. ed. 299), we are of the opinion that when Congress, by the terms of the 'Original Agreement,' adopted the laws of descent and distribution of the Creek Nation,

supra, it, at the same time, adopted the construction placed thereon prior thereto by the Supreme Court of that nation, and that we are bound by that construction."

The said Act of April 6, 1894, conferring jurisdiction upon the Creek courts to try property rights between citizens of the Creek Nation and non-citizens of the Creek Nation, was intended to meet the situation defined by the *Gibson* case, *supra*. By virtue of this Act of April 6, 1894, the Creek courts could partition and distribute the estate of a deceased Creek Indian even though one of the heirs was a non-citizen of the tribe.

Under a subsequent heading in this brief entitled "The heirs took the allotment by inheritance and not as allottees," etc., we shall attempt to show fully that these exclusion statutes prohibiting non-citizens from participating in the final distribution of the lands in no way interfered with the taking by inheritance or as if by inheritance the allotted Creek lands by non-citizen heirs where the allotment was made to the heirs as provided in section 28 of the Original Creek Treaty, *supra*. As suggested in the brief for plaintiff in error, this question was first decided many years ago (to be exact, September 6, 1905) in the United States Court for the Western District of the Indian Territory, Judge Raymond presiding, in the case of *Porter* v. *Brook*, in which case the learned judge announced his opinion, in part, in the following language, referring to said

sections excluding non-citizens from participation in the lands:

> "Clearly this pertains to the final division of the lands among the citizens of the nation. In other words, that he (the non-citizen) shall not be counted in making up the great fractions which shall express what share of the soil shall belong to each citizen, that is, he shall not receive an allotment. If it is true that a non-citizen father may inherit from his son, who dies intestate leaving no wife or child, this is not permitting him to participate in the final division of the lands. *He receives nothing from the Creek Nation. He is not counted in making up the fractions which shall express what share of the soil shall belong to each citizen.* He becomes the owner of a portion of the child's estate because of his kinship to the child, the same going to him, not from the Creek Nation, but from the child to whom the Creek Nation had granted it, *and this share to him in no wise diminishes the proportionate share of the Creek citizen in the final division of the lands.*"

Mullen v. *United States.*

The case of *Mullen* v. *The United States,* 224 U. S. 448, 56 L. ed. p. 834, completely forecloses the contention made by the plaintiff in error. It involved the construction of the Choctaw-Chickasaw Supplemental Agreement, particularly section 22 thereof, which provides as follows:

> "If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this

agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided,* That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted."

Said section 22 is in every way similar to section 28 of the Original Creek Agreement, *supra.* There is this formal difference: Section 22 of the Choctaw-Chickasaw Agreement provided that all patents should be issued in the name of the allottee, the same to inure to the benefit of the heirs, whereas section 28 provides for the issuance of patents to the heirs. In the *Mullen* case this distinction was held as unimportant, the court broadly announcing that where the allotments in the Choctaw-Chickasaw nations were made or selected after the death of an allottee who would have been entitled to receive the same had he lived, that the same would pass by descent or as if by descent to his heirs, whether citizens or non-citizens of those tribes, and as of the date of the death of the allottee, saying:

"The question now presented—with regard to the conveyances made to the appellants —arises in the second class of cases; that is, where a person whose name appeared upon the rolls died after the ratification of the agreement and before receiving his allotment. In this event, provision was made for allotment in the name of the deceased person, and for the descent of the lands to his heirs. This is contained in paragraph 22 of the Supplemental Agreement:

> 22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution, as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.'

In the cases falling within this paragraph, there is no requirement for the selection of any portion of the allotted lands as a homestead, and there is no ground for supposing that it

was the intention of Congress that a provision for such selection should be read into the paragraph, so as to assimilate it to paragraph 12, relating to allotments to living members. While the lands were to be allotted in the name of the deceased allottee, they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. *No distinction is made between the heirs; they might or might not be members of the tribe; and where there were a number of heirs, each would take his undivided share.* It is quite evident that there is no basis for implying the requirement that in such case there should be a selection of a portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute.

In the agreement with the Creek Indians (Act of March 1, 1901, 31 Stat. L. 861, chap. 676), it was provided that in the case of the death of a citizen of the tribe after his name had been placed upon the tribal roll made by the Commission, and before receiving his allotment, the lands and money to which he would have been entitled, if living, should descend to his heirs, 'and be allotted and distributed to them accordingly.' The question arose whether, in such cases, there should be a designation of a portion of the allotment as a homestead. In an opinion under date of March 16, 1903, the then Assistant Attorney General for the In-

terior Department (Mr. VAN DEVANTER) advised the Secretary of the Interior that this was not required by the statute. He said: 'After a careful consideration of the provisions of law pertinent to the question presented, and of the views of the Commissioner of Indian Affairs and the Commission to the Five Civilized Tribes, I agree with the latter that in all cases where allotment is made directly to an enrolled citizen, it is necessary that a homestead be selected therefrom and conveyed to him by separate deed; but that where the allotment is made directly to the heirs of a deceased citizen, there is no reason or necessity for designating a homestead out of such lands, or of giving the heirs a separate deed for any portion of the allotment, and therefore advise the adoption of that rule.' It is true that under the Creek Agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw Agreement the allotment was to be made in the *name* of the deceased member, and 'descend to his heirs.' This, however, is a merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the names of the heirs furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead."

Let us see whether non-citizens of the Choctaw and Chickasaw Nations were prohibited from participating in the final distribution of the lands just

as they were in the Creek Nation. *They were, in the broadest terms.* The Choctaw-Chickasaw laws not only prohibited such final participation, but various Acts of Congress in broad terms provided that non-citizens of those nations should not participate in the final allotment and distribution of the lands. We need not go further than the Acts of Congress. The Act of June 28, 1898, at section 21, provides, in part, as follows:

> "The several tribes may, by agreement, determine the right of persons who for any reasons may claim citizenship in two or more tribes and to allotment of lands and distribution of moneys belonging to each tribe. * * * The rolls so made, when approved by the Secretary of the Interior, shall be final and the persons whose names are found thereon with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws shall alone constitute the several tribes which they represent."

The Choctaw-Chickasaw Agreement (32 Stat. L. 641) provides:

> "*No person whose name does not appear upon the rolls prepared as herein provided, shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes,* and those whose names appear thereon shall participate in the manner set forth in this agreement: *Provided,* That no allotment of land or other tribal property shall be made to any person or to the heirs of any person whose name is on the said rolls and who died prior to the date of the final ratification of this agreement."

The language of the acts of the Creek Council above quoted passed in 1890 and 1894, providing that non-citizens of the Creek Nation should not participate in the final distribution of the lands, are no broader in terms than the express Acts of Congress relating to the Choctaws and Chickasaws; yet we find that this court has said, in plainest terms, in the *Mullen* case:

> "No distinction is made between the heirs; *they might or might not be members of the tribe;* and where there were a number of heirs each would take his undivided share."

It is clear, therefore, that Congress put the Creek law of descent and distribution in force to determine in cases where the allotments were made to the heirs, who would take the land and the proportions in which they would take the same, and that where the heirs or any of them, were non-citizens of the Creek Nation they would take by inheritance, or, if the term inheritance is technically incorrect, as if by inheritance *and as if the dead citizen had received his allotment in his lifetime.*

The decision of this court in the *Mullen* case permitting non-citizens of the Choctaw and Chickasaw Nations to take as heirs where the allotment was made to the heirs, is in thorough accord with the new policy of Congress to put the Indians and whites upon the same plane as rapidly as possible. In this connection we direct attention to *Re Heff,*

197 U. S. 488, 49 L. ed. 848, and particularly to the following language used by Mr. Justice BREWER:

> "Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris.* And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation; but when that purpose is made clear the question is at an end."

But if a non-citizen of the Creek Nation were excluded from taking as an heir of the deceased citizen who died without receiving his allotment, the result in this case would be the same. Minnie Solander, the citizen entitled to receive the 160 acres of land, died in October, 1899, leaving not only her non-citizen husband, George Solander, but a daughter, Hettie, who was a citizen of the Creek Nation.

Under the construction of the law, and as announced by the Supreme Court of Oklahoma and the Circuit Court of Appeals for the Eighth Circuit, the devolution of this property should be considered as passing as of the date of the death of Minnie Solander, one-half to her non-citizen husband and one-half to her child, Hettie; but if the non-citizen husband did not take, the devolution must be counted as if Hettie, the Creek citizen, took it all. Hettie died in November, 1899, leaving her said father, George Solander, the non-citizen of the Creek Nation. On the other hand, since it is manifest from the various Acts of Congress relating to the allotments to be made to the heirs that they should take just as if their ancestors had received the lands, then this estate must be considered, if plaintiff in error's contention prevails, as passing to Hettie, and from Hettie to her father, the non-citizen.

Section 6 of the Supplemental Creek Treaty, *supra,* invoked upon behalf of plaintiff in error, which provides, in part, that only citizens of the Creek Nation and their "Creek descendants," shall inherit lands of the Creek Nation and providing, further, that if no person of the Creek citizenship or Creek descent shall take the descent, that the estate shall go to non-citizens, has no application here, because the allotment was selected and certificate therefor issued, and the equitable estate thereto passed to the heirs prior to the enactment of section 6. The Creek law, without any such inhibition

excluding a non-citizen of the Creek Nation from inheritance, was in full force and effect from April 1, 1899, until the first day of July, 1902, the date when the Supplemental Creek Treaty became effective. Nor does said section 6 aid in the construction of the Creek law, unless it is to show that theretofore, as understood by the Creeks, non-citizen heirs took allotted lands where the allotments were made to the heirs. But the short life of this inhibition against inheritance by non-citizens proves the point heretofore made that every backward or reactionary step was speedily corrected or retraced, for, in the Act of April 28, 1904, we find that Congress provided:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedman or otherwise."

Probably one of the effects of this act was to repeal the inhibition in said section 6 directed against inheritance by non-citizens of the Creek Nation where the allotment was made to the heirs. If this was not accomplished, certainly the repeal was effected with the coming of statehood, by the provision in the Enabling Act, at section 21 thereof, providing:

> "And all the laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union shall be in force

> throughout said state except as modified or changed by this act or by the constitution of the state."

At the most, therefore, the discrimination, contained in said section 6, against non-citizens of the Creek Nation was short-lived.

The contention that non-citizens of the Creek Nation were considered as *aliens* within the period between April 1, 1899, and July 1, 1902, is wholly without support in reason or authority. As was said in *Crane* v. *Reeder*, 21 Mich. 24, cited upon behalf of plaintiff in error, the ground upon which aliens are excluded from inheritance, is this:

> "There has always been a policy aiming at inducing aliens to become citizens, but none which would render it indifferent to them whether they became citizens or not."

Surely the Creek Nation never treated non-citizens of the tribe as aliens in order to induce them to apply for citizenship in the tribe, a right which they guarded with considerable jealousy, since the enrolled members of the tribe were to be considered as the *units* for the final partition or distribution of the public domain of the tribe. Moreover, a series of congressional acts and treaties cited in *Re Heff*, *supra*, show the intention of Congress and of the Creek tribe to place citizens and non-citizens, as regards the right of citizenship, in the same class. On the 3rd day of March, 1901 (31 Stat. L. 1073), all the Indians of the Five Civil-

ized Tribes were made full citizens of the United States. Therefore, both the Indians and the white people were citizens of a common country and were not aliens as to each other. The presumption always prevails that the citizens of a common country may inherit from each other freely, unless there is an express statute to the contrary. There was no law, express or implied, prohibiting such inheritance by a non-citizen within the period beginning April 1, 1899, and ending July 1, 1902, the time at which the descent in this case was cast.

The heirs took the allotment by inheritance and not as allottees, and as of the date of the death of their ancestor, each enrolled citizen's right to an allotment vesting as of April 1st, 1899.

Under the plan of allotment set forth in the Acts of Congress hereinbefore quoted all of the enrolled citizens of the Creek Nation living on the 1st day of April, 1899, were to receive allotments—that is to say, they alone were to constitute the *units* for the final partition and distribution of the public domain of the Creek Nation. Under the provisions of section 28 of the Original Creek Agreement, if an enrolled citizen had died, or should die, before actually receiving his allotment certificate, nevertheless the land to which he would have been entitled, if he had lived, was to be set aside as *his* allotment and the same should descend to the heirs of such

deceased allottee under the Creek law. Every citizen living on April 1, 1899, shared the lands equally. Where an allotment was made to the heirs of a citizen they did not take it as an *additional allotment*, or as an *additional bounty*, but *in the right of the original allottee* and as from him. In cases where the lands were allotted to the heirs they did not take directly from the tribe by allotment, *but through their ancestor's right*—not by purchase—*but by descent*. This consideration alone relieves the defendant in error from the charge made by plaintiff in error to the effect that the non-citizen husband is attempting to take directly from the Creek Nation and thereby share as an allottee in the final distribution of the tribal lands. To decree that the husband—a non-citizen of the Creek Nation—took an interest in the allotment of his deceased wife as an heir, is not to enlarge to any extent the number of tribal *units* for the final partition and distribution of the tribal property. His wife, though dead, constituted one of these units upon which the division was made. The acts of the Creek Council of 1890 and 1894 hereinbefore quoted, excluding non-citizens of the Creek Nation from participation in the final distribution of the lands of the tribe, are given full force and effect by the enrollment of the deceased wife and by the allotment to her to inure to the benefit of her heirs. By this scheme the non-citizen husband was excluded from participation. He was not enrolled; no allot-

ment was made to him—he was merely one of the heirs, provided by the Creek law to take the right and estate carved out for his wife, an enrolled citizen. The descent was cast in every respect just as it would have been had the wife lived to select and actually receive her 160 acres of land, the same being her proportionate part of the tribal public domain.

In *Shulthis* v. *McDougal,* 170 Fed. 529. this identical question arose, and after the most careful consideration the Circuit Court of Appeals for the Eighth Circuit held that it was wholly immaterial whether the ancestor or citizen entitled to receive the allotment, was actually seized of the property in his or her lifetime; that the allotment to which the citizen would have been entitled, had he lived, passed to the heirs *in the right* of the deceased citizen, and *not directly* from the Creek Nation, so that the situation is, in all respects, the same as regards those who inherit and the proportions taken by them as if there had been a technical descent from the citizen entitled to the allotment, using the following language:

> "The word 'descend' is, of course, inapplicable to the actual contingency provided for by the statute, because that contingency contemplates the death of the child before he had actually become seized of any interest in the land. The word 'descend' is a word of art, and indicates the transference of property by inheritance. If any significance is to be given

to it as used in this section, it must be held that the intent of the parties to the agreement was that the land should pass to the same persons and in the same proportions as it would have passed if the child had died seized of it. *Any other construction* simply obliterates this word, and makes the land pass to the parties who are heirs *directly by allotment from the tribe.* The statute itself not only declares that it shall 'descend,' but also declares that it shall be 'allotted and distributed,' to the heirs. It is manifest, therefore, that both ideas were in the minds of the parties to the agreement.

This construction receives further support by the general scheme which the federal government and the Creek Nation formed for the disposition of the tribal property. The first requisite for the partition of the tribal estate in severalty among its members was to ascertain and legally establish who were members of the tribe. By reason of the many intermarriages between members of the tribe and members of the white and negro races, and by reason of the fraudulent claims to membership, the ascertainment of the particular persons who were in fact entitled to such membership proved a much more difficult task than was at first anticipated. The Commission was empowered and directed to prepare such a roll. This work not only required much investigation on its part, but resulted in voluminous litigation. Instead of being a work of months, it proved to be a work of years. In the meantime, however, the membership of the tribe was constantly undergoing change by birth and death. In order to provide for all members of the tribe who were born subsequent to the begin-

ning of the enrollment, the date of right to enrollment was twice set forward, the statute last quoted fixing the latest date. By reason of these facts, when the roll was completed, it contained more names than there were members in being. The roll, however, furnished the basis for the division of the tribal estate. Every person whose name was entered on the roll was entitled to an equal proportion of the tribal land and funds; but by reason of the fact that before actual distribution could be made, and even while the enrollment was in progress, some persons whose names were on the roll would die, the statute made provision for the disposition of the share of tribal property undistributed. It was never the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. The tribe was not bestowing such land as a bounty, but was simply providing for the right of inheritance.

Congress itself has construed this statute. Section 5 of the act (Act April 26, 1906, c. 1876, 34 Stat. 137) provides:

> 'That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee; and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs; and in case any allottee shall die after the restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life; and all

> patents heretofore issued where the allottee died before the same became effective, shall be given like effect.'
>
> Here is an express declaration by Congress that the land shall descend to heirs the same as it would have descended if the patent or deed had issued to the allottee during his life, and it is declared that allotments for allottees who have died shall also thus descend. This interpretation by Congress of its own act leaves no room for doubt as to its intent."

In *McKee* v. *Henry*, 201 Fed. 74, a similar question arose and the Circuit Court of Appeals again announced the same rule of construction approving a line of Oklahoma cases decisive of the question here under discussion, among them the case of *Shellenbarger* v. *Fewell*, 124 Pac. 617, 34 Okla. 79, the same being one of the cases here submitted.

In *Shellenbarger* v. *Fewell, supra*, there is an excellent discussion of this point by the Supreme Court of Oklahoma as follows:

> "We now come to consider the remaining proposition in the case. The record is silent as to the date of the selection of the allotment; but from the admissions in the agreed statement of facts, and the briefs of both parties, we must conclude that the allotment was selected and certificate thereof issued under the 'Original Creek Agreement.' Act of Congress of March 1, 1901, c. 676, 31 Stat. 870.
>
> Such being the case, the allotment of Minnie Solander, not having been made at the date of her death, but later, made under the 'Original

Creek Agreement,' *supra*, the same descended to her heirs according to the law of descent and distribution of the Creek Nation, as admitted and contended by both parties in this case. In the case of *deGraffenreid et al.* v. *Iowa L. & T. Co.*, 20 Okla. 711, 95 Pac. 624, in discussing the Original Creek Agreement, on this point it is said: 'In short, sections 6 and 7 of this agreement fix the descent of the allotment (both surplus and homestead) in cases where the allottee receives his allotment before he dies, and section 28 fixes it in cases where he dies before receiving his allotment. In either case it was intended to "descend to his heirs according to the laws of descent and distribution of the Creek Nation".'

In the case of *Barnett* v. *Way*, 29 Okla. 780, 119 Pac. 418, it is said: 'We think it was the intent to provide that the land to which a deceased Indian, who was entitled to an allotment, should be allotted to and received by those persons as heirs of such Indian that would have received it under the Creek laws, if the allotment had been made to the deceased at the time of his death and had descended under said law.' In the *Barnett* case, *supra*, the allotment was selected and certificates issued under the 'Curtis Act' (Act June 28, 1898, c. 517, 30 Stat. 495), which provided for an allotment of the use and occupation of the surface only, and the Indian entitled to the allotment died before the adoption of the Original Creek Agreement. In the body of the opinion it is said: 'What the rule of descent and distribution was at the time of the death of Cita Barnett and her father, George Barnett, is unimportant; for, at the time of her death, she had no title, equitable

or legal, in the fee in her allotment to descend. The rule of descent and distribution adopted by the treaty and to be applied in such case is the rule of descent and distribution in force in the Creek Nation, governing the devolution of property owned by any of its deceased members at the time of such member's death.'

It has been held in *Brady* v. *Sizemore,* 124 Pac. 615 (not officially reported), that where a duly enrolled citizen of the Creek Nation died before receiving his allotment, and it was later allotted to his heirs, August 23, 1902 (under the 'Creek Supplemental Agreement' Act of Congress approved June 30, 1902, ratified July 26, 1902), that the devolution of the allotment is governed by chapter 49 of Mansfield's Digest of the Laws of Arkansas (Ind. T. Ann. St. 1899, Secs. 1820-1843), to be applied as if deceased had received title to his allotment and died seized thereof. See *Sanders* v. *Sanders,* 28 Okla. 59, 117 Pac. 338; *Hooks* v. *Kennard,* 28 Okla. 457, 114 Pac. 744; *Barnett* v. *Way, supra,* and *Brady* v. *Sizemore, supra.*

It may be gathered from a reading of the cases decided in this court, upon the question of the devolution of a Creek allotment, that the law of descent, in force at the date the selection of the allotment takes effect, governs as to the classification of the heirs; and this law relates back to the death of the Indian entitled to the allotment, and identifies the heirs as of that date.

The selection of an allotment, under the 'Curtis Act,' *supra,* though made prior to, takes effect upon the date of the approval of the Original Creek Agreement, *supra,* and allotments so selected, together with those selected under

the 'Original Creek Agreement,' pass to the heirs of the Indian entitled to take the allotment, under the Creek laws of descent; while those allotments selected under the Creek Supplemental Agreement (Act of Congress June 30, 1902, c. 1323, 32 Stat. 500) pass under the laws of descent found in chapter 49 of Mansfield's Digest of the Laws of Arkansas. In either event, you take the governing law of descent, and carry it back to the date of the death of the Indian entitled to take the allotment, and identify the heirs of such Indians, under such law of descent, as of the date of such death.

(5) Then who were the heirs, under the Creek law of descent, of Minnie Solander? Plaintiff contends they were her non-citizen husband, George Solander, and her daughter, Hettie Solander. Defendant contends that her sister Phoebe Trusler was her heir, for the reason that her daughter Hettie died before the selection of the allotment, and that her non-citizen husband could not inherit.

We think, under the law and the decisions of this court, that the contentions of the plaintiff are correct. That the non-citizen husband would take an heir's part, under the Creek law of descent, has been held by this court, upon exhaustive and satisfactory reasoning. In *de-Graffenreid* v. *Iowa L. & T. Co., supra*, it is said: 'When in the original agreement the Creek people said that the allotments made thereunder should descend under the laws of descent and distribution of the Creek Nation, it necessarily follows that they meant that therein the intermarried non-citizen husband should receive out of his citizen wife's allotment an heir's part, etc.' That an allotment, under circumstances similar to the ones here, would go to the heirs,

as of the date of the death of the Indian entitled to the allotment, has been held in *Barnett* v. *Way*, and *Brady* v. *Sizemore* and *Morley* v. *Fewel*, 122 Pac. 700 (not officially reported), *supra*. Therefore, her daughter Hettie, being alive when her mother died, and being the only child, and her non-citizen father being held entitled to take an heir's part, it follows that the allotment of Minnie passed to George and Hettie Solander in equal parts, and upon the death of Hettie Solander, intestate and without issue, December 19, 1899, her share was cast upon her father, George Solander, as her nearest relation, who had the right April 27, 1906, to convey the whole estate to plaintiff as was done."

In *Ground* v. *Dingman*, decided November 12, 1912, 127 Pac. 1078, 33 Okla. 760, the Supreme Court of Oklahoma clearly and forcibly presents the point here under discussion as follows:

"Although seized of no estate of inheritance therein, that this land went, whether by descent or purchase it is immaterial to say, by virtue of section 28, *supra*, to the heirs of Susan Thompson, as designated by the Creek law, *supra*, in being at the time of her death, is no longer an open question in this jurisdiction.

In *Barnett et al.* v. *Way et al.*, 29 Okla. 780, 119 Pac. 418, Cita Barnett, an enrolled citizen of the Creek Nation, selected her allotment under section 11 of the Curtis Act, and died before the ratification of the original Creek treaty (Act March 1, 1901), wherein, by section 6, her allotment was ratified to her heirs. It was there held that the Creek law of descent and distribution governed the devolution of the estate, pursuant to section 28, *supra;* and that her

father her surviving, took her allotment as though she had received title thereto during her lifetime and died seized thereof. In the syllabus the court said: 'The descent and distribution of the allotted lands of an enrolled Creek Indian, who died before the ratification of the Original Creek Treaty (Act March 1, 1901, c. 676, 31 Stat. 861), and who had during her lifetime allotted to her, under section 11 of the Curtis Act (Act June 28, 1898, c. 517, 30 Stat. 495) the use and occupancy of the surface of the allotment, which was thereafter, by section 6 of the Original Creek Treaty, ratified and deed issued to her heirs therefor is, by reason of Section 28 of the Original Creek Treaty regulated and controlled by the law of descent and distribution of the Creek Nation. In determining who are the heirs of a deceased enrolled Creek Indian, who, during her lifetime, received the allotment of the use and occupancy of an allotment, which, after her death, was ratified to her heirs by virtue of section 6 of the Original Creek Treaty (Act March 1, 1901, c. 676, 31 Stat. 861), the laws of descent and distribution of the Creek Nation are to be applied as if the deceased Indian had received title to her allotment during her lifetime and died seized thereof.'

As there is no substantial difference between the facts in that case and this, and in neither did the allottee die seized of an estate of inheritance, the law there announced, in effect, that, having died before receiving her allotment, the land went to her heirs under the Creek law precisely as though the allottee was so seized at the time of her death, will be followed here.

In *Morley et al.* v. *Fewel,* 122 Pac. 700, the facts were that Minnie Solander, the allottee, a citizen of the Creek Nation living on April 1, 1899, and duly enrolled as such, died intestate on October 8, 1899, leaving her surviving George A. Solander, her husband, and Hettie L. Solander, her child, who died intestate, without issue, December 19, 1899; that Phoebe Trussler was the only sister of Minnie Solander, who left no brother surviving, or the descendants of any brothers or sisters; that on December 3, 1901, the Commission to the Five Civilized Tribes, set apart the allotment of Minnie Solander, to which a patent was issued in the name of her heirs. The only question in that case was: Did George A. Solander inherit the lands allotted to the heirs of his wife, Minnie Solander? This court, speaking through Rosser, C., following the rule laid down in *Barnett* v. *Way, supra,* held that he did. In passing the court said: 'The right of the heirs of Minnie Solander to select her allotment after her death was created by section 28 of the Original Creek Agreement. She had no title to the lands at her death, and it only came into existence after the Original Creek Agreement became the law; and the right in her heirs to have it selected after her death was created by the provisions of section 28 of that agreement. As the right was created by that section, it was competent to provide in the section who were the persons entitled to take under its provisions. By its terms the same persons are entitled to take as heirs of Minnie Solander as would have been entitled, had she selected the allotment in her lifetime, and lived until after the Original Creek Treaty took effect, and had then died seized of

the land, leaving the same heirs, bearing the same relation to her and to each other at that time as they actually bore at the actual time of her death. If the land had been allotted to her and she had died while the Original Creek Treaty was in force, leaving George A. Solander and Hettie L. Solander, her husband and daughter, living, her heirs would have been her husband, George A. Solander, and her daughter, Hettie L. Solander. Then, if Hettie L. Solander had died afterwards, without husband or issue, while that treaty was in force, her father would have inherited her land. The fact that George A. Solander was a white man would not have prevented him from inheriting as heir to his wife, nor as heir to his daughter. *deGraffenreid* v. *Iowa Land & Trust Co.*, 20 Okla 687, 95 Pac. 624."

The case of *Mullen* v. *United States, supra,* is again controlling. There the court held that it was immaterial whether the citizen entitled to take the land lived to receive it; that where it was allotted to the heirs the descent was in every respect the same as in the cases where the lands had been allotted and patented to the living citizens. In the course of its discussion this court cited section 5 of the Act of April 26, 1906, which provides that the result is the same whether the patents issue to the original allottees or to the heirs.

The following Texas cases hold that the persons intended by grant upon the part of a state to the heirs of a certain person, are those who would

have inherited the right granted had it existed at his death:

Goodrich v. *O'Conner*, 52 Tex. 375;

Wardlow v. *Miller*, 6 S. W. 292, 69 Tex. 395;

Waterman v. *Charlton*, 120 S. W. 171, 102 Tex. 510.

In *Waterman* v. *Charlton, supra*, the Supreme Court of Texas, held:

> "The persons intended by a state grant to the heirs of a certain person are those who would have inherited the right granted had it existed at his death."

In the case of *Clark* v. *Lord*, 20 Kan. 390-395, the Supreme Court of that state construed statutes somewhat similar, saying:

> "The patent was not issued to Eleanor Richardson but to 'the heirs of Eliza Richardson' and said Eleanor Richardson obtained her interest, *not as an allottee, nor as the patentee,* but by virtue of the laws of the state of Kansas, which authorized her as an heir of Eliza Richardson to inherit the estate of her sister. If Eliza had lived the lands would have been allotted and patented to her. After her death they were patented to her heirs without naming them and the law of the state determined who these were."

This decision was handed down when Judge Brewer was a justice upon the supreme bench of Kansas, he, with all the justices, concurring in the opinion.

Application of rule permitting non-citizens of the Creek Nation to inherit from their Creek ancestors.

The field for the operation of the rule permitting non-citizens of the Creek Nation to inherit allotted lands from their ancestors is very limited. We know of no cases that have arisen except where the surviving husband or wife has taken either a part or the entire allotment from the deceased spouse. The devolution of this property to the surviving husband or wife is not only *in accord with natural affection but is necessary for the stability of the family life.* In almost every case the surviving non-citizen husband or wife is left with the responsibility of supporting the children of the deceased allottee. *To take away from the surviving parent all right to a home is to undermine the family life.* Some of the white women who intermarried with Creeks had children born the issue of their marriage with Creek Indians too late for allotment. Such children were themselves non-citizens of the Creek Nation—that is they were not enrolled members of the tribe. To give the Creek statutes the construction contended for upon behalf of plaintiff in error it must follow that these children, without tribal enrollment, could not inherit the lands allotted to their own father. Even the unnatural and short-lived inhibition in section 6 of the Supplemental Creek Treaty, *supra*, which sought to cast

inherited allotments so as to exclude white people, made provision for the unenrolled relatives of the deceased, if of Creek blood. This section provides that only citizens of the Creek Nation and their *Creek descendants* shall inherit the lands of the Creek Nation. By *Creek descendants* is meant persons of Creek blood, although not enrolled. *Lamb* v. *Baker*, 27 Okla. 739, 117 Pac. 189. But this strict statute only excluded white persons from taking as the *first* heirs of the citizen who died without receiving his allotment. That is to say, had section 6 been in force when the allotment involved here was selected it would have barred George Solander from taking as an heir of his wife, Minnie Solander, and would have cast the entire estate upon their daughter, Hettie. But upon the death of Hettie, George Solander would have taken the entire allotment *as the heir of Hettie.* Therefore there never has been a statute in force at any time which would bar George Solander from taking all of the land involved. If counsel for plaintiff in error were correct in his proposition that a non-citizen of the Creek Nation could never take in the first instance as an heir of a Creek citizen who died before receiving his allotment, still the defendant in error must recover because he takes through his daughter, Hettie, who had taken from her mother.

The decision in *deGraffenried* v. *Iowa Land & Trust Company* has become a rule of property.

—*deGraffenried* v. *Iowa Land & Trust Company*, 20 Okla. 687, 95 Pac. 624;

Lamb v. *Baker*, 117 Pac. 189, 27 Okla. 739;

Sanders v. *Sanders*, 117 Pac. 338, 28 Okla. 59;

Hughes Land Company v. *Bailey*, 120 Pac. 290, 30 Okla. 194;

Divine v. *Harmon*, 121 Pac. 219, 30 Okla. 820;

Morley v. *Fewell*, 122 Pac. 700, 32 Okla. 452;

Shellenbarger v. *Fewell*, 124 Pac. 617, 34 Okla. 79;

Reynolds v. *Fewell*, 124 Pac. 623, 34 Okla. 112;

Bilby v. *Brown*, 126 Pac. 1024, 34 Okla. 738;

Ground v. *Dingman*, 127 Pac. 1078, 33 Okla. 760;

Woodward v. *deGraffenried*, 131 Pac. 162, 36 Okla. 81.

The decree in the *deGraffenried* case was entered by the United States Court for the Western District of the Indian Territory on the 11th day of May, 1907. Counsel for the plaintiff in error was then the presiding judge of that court, and held that a non-citizen of the Creek Nation could not inherit a Creek allotment, but prior to that date on the 6th day of September, 1905, with Judge Raymond pre-

siding, the said United States Court for the Western District of the Indian Territory, in the case of *Porter* v. *Brook*, held that such non-citizen did inherit under said Creek law. It is an historical fact that the *Porter-Brook* decision quoted in part *supra* was given wide publicity, and that same *was widely accepted as a correct construction of the law.* When Judge LAWRENCE, in May, 1907, caused a decree to be entered excluding a non-citizen of the Creek Nation from inheriting, the cause was immediately appealed to the Court of Appeals for the Indian Territory, and was numbered 856 in that court and transferred to the State Supreme Court with the admission of Oklahoma into the Union. The decision of the Supreme Court of Oklahoma was handed down April 13, 1908, since which time at least ten or twelve cases of like import have been reported by the Supreme Court of the state. In the decision of *Woodward* v. *deGraffenried*, decided by the Supreme Court of Oklahoma September 17, 1912, that court said, in referring to the original *deGraffenried* case:

> *"The decision in that case has become a rule of property. * * * The decisions cannot and should not be overturned. Descent of property after it has lost its tribal character should follow the line of natural affection, and there is no reason for presuming that a member of the Creek tribe has not the same affection for his or her white relations as for relations of the Indian blood of the same degree of relationship."*

The case of *Mullen* v. *The United States* (204 U. S. 448, 56 L. ed. 834) decided April 15, 1912, construing Choctaw-Chickasaw treaties similar to the Creek treaties, and holding that where allotments were made to the heirs that non-citizens inherited just as citizens of the tribe, was immediately accepted throughout that part of Oklahoma formerly the Creek Nation, as announcing the doctrine of the *deGraffenried* case by the Supreme Court of the state. *Many transfers have been made upon the faith of the state court's decisions upon this point, and upon the construction which the people generally have given the Mullen case*, and to overturn these decisions would be to produce great confusion, to deprive many *bona fide* purchasers of vast estates and to unsettle, to an intolerable degree, the already uncertain land titles in that part of Oklahoma which was formerly the Indian Territory.

In the case of *deGraffenried* v. *Iowa Land Co., supra,* the land was actually selected by the ancestor who died after receiving the certificate of selection which was the evidence of title. There the allottee died seized of an estate in the land. The patent subsequently issued was but the evidence of the right of which the allottee died seized. Here the citizen entitled to select an allotment died before selection and without any title to descend to her heirs, but the result is the same, for the allotments were made *in the same right*—in each case it was the enrolled citizen's share in the public do-

main—in the two cases the deaths occurred *under the same law* of descent. The land was selected under the *same law* giving the right thereto; the title in each case had its incipiency *under the same law*. It is inconceivable, therefore, that the descent in the one case would pass in any manner different from the other merely because in the one case the citizen selected his land prior to his death and in the other it was selected after death. In order to effect any such difference, the court must hold that the heirs took directly from the Creek Nation instead of from their ancestors from whom they received the land after it had lost its tribal character. The descent is exactly the same in both cases as if both citizens had been enrolled on April 1, 1899, and the allotments selected on that date. Any other construction would lead to absurdity, for if the statutes are not so construed the lands allotted to an Indian on the first day of April, 1899, might descend to heirs entirely different from those who would have inherited had the selection been made on the second day of April, 1899.

The land was alienable at the time of the conveyances involved.

The allotment having been made to the heirs under the provisions of section 28 of the Original Creek Agreement, *supra*, was never restricted.

—*Mullen* v. *United States*, 224 U. S. 448, 56 L. ed. 834;

Reed v. *Welty*, 197 Fed. 419;

Shulthis v. *McDougal*, 170 Fed. 529;

Deming Investment Co. v. *Bruner Oil Co.*, 35 Okla. 395, 120 Pac. 1157;

Bilby et al. v. *Gilliland*, 41 Okla. 150, 137 Pac. 687.

The Department of the Interior long ago accepted this construction of the law governing lands allotted to the heirs of Creek Indians and released jurisdiction of the same. On December 10, 1913, Preston C. West, Assistant Attorney General, in an opinion to the Secretary of the Interior *in re* oil and gas lease covering allotment of Louis Francis, referring to the *Mullen*, *Reed* and *Shulthis* cases, *supra*, said:

> "While it must be confessed that the last three decisions referred to are apparently somewhat paradoxical, it is to my mind, nevertheless, clearly deducible therefrom that an allotment made on account of an Indian who never lived to receive the same himself, and who therefore never was at any time during his life seized of any estate in the land, is a direct allotment to those who, for the want of a better term, are denominated his heirs, but who are

in reality, only persons whom the statute points out as the first takers. *Stevenson's Heirs* v. *Sullivant* (5 Wall. 207). And further, that lands so allotted were without any restriction upon alienation up to the passage of the Act of Congress approved April 26, 1906 (34 Stat. 137)."

In the recent case of *United States* v. *Bartlett*, this court held that the Act of April 26, 1906, referred to in the above opinion of the Assistant Attorney General, did not reimpose restrictions. It therefore follows that this entire allotment has always been unrestricted. Counsel for plaintiff in error contends that even if the court should hold that George Solander, a non-citizen of the Creek Nation, took an undivided half interest in his wife's allotment upon the selection thereof, the other half going to the allottee's daughter, Hettie, that the half interest received by the husband passed to him *restricted like an original allotment in the hands of a full-blood Creek Indian.* These actions below were in ejectment. Plaintiff in error invokes the rule that the plaintiff below must recover, if at all, upon the strength of his own title and therefore he urges that even had George Solander inherited the undivided half interest in the land from his wife, as we contend, that his grantee could not recover the same in ejectment. To meet this objection we ask the court to hold that the entire allotment was always alienable.

But had the heirs received the land restricted, the grantor, being *not of Indian blood,* could convey in virtue of the Act of April 21, 1904 (33 Stat. L. 189), which provides:

> "And all of the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed."
>
> —*Franklin* v. *Lynch,* decided by this court on April 6, 1914.

This allotment having been made to the heirs, there was no homestead, as was held in the *Mullen* case, *supra.* Since April 21, 1904, all allotted lands in the Five Civilized Tribes, excepting homesteads, and excepting lands allotted to minors, have been alienable in the hands of all those not of Indian blood. The Supreme Court of Oklahoma has so construed the Acts of Congress.

Wherefore, the defendant in error prays that the judgments in his favor be affirmed.

Respectfully submitted,

HENRY B. MARTIN,
JOSEPH C. STONE,
Attorneys for Defendant in Error.

Supreme Court,
FILED
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JAMES D. MAHE
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No. 103

In the

Supreme Court of the United States.

October Term, 1914.

JOHN H. SHELLENBARGER, - *Plaintiff in Error,*

vs.

WILLIAM M. FEWELL, - - - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Brief, Amicus Curiae, in Support of Contentions of Plaintiff in Error.

GRANT FOREMAN,
Amicus Curiæ.

JAMES D. SIMMS,
Of Counsel.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 434.

JOHN H. SHELLENBARGER, - *Plaintiff in Error,*

vs.

WILLIAM M. FEWELL, - - - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF, AMICUS CURIÆ, IN SUPPORT OF CONTENTIONS OF PLAINTIFF IN ERROR.

May It Please the Court:

We believe the contention of the plaintiff in error in this case is correct, and that the judgments of the courts below should be reversed. In arriving at a determination of the issues presented by the petition in error we believe that aid is to be found in a consideration of two propositions that have not been discussed in the briefs, but which nevertheless are involved in the assignment of error.

The record is silent as to the exact date the allotment was made to the heirs of Minnie Solander,

though it does inform us that it was made after the deaths of both Minnie Solander and her daughter, Hettie Solander. The court below in its opinion, 34 Okla. 91, 124 Pac. 617, says that "from the admissions in the agreed statement of facts, and the briefs of both parties, we must conclude that the allotment was selected and certificate thereof issued under the 'Original Creek Agreement' Act of Congress of March 1, 1901 (31 Stat. L. 870)." The part of that act (Sec. 28) under which the allotment was made reads as follows:

> "All citizens who were living on the first day of April, eighteen hundred and ninety nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June 28th, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."
>
> "The rolls so made by said commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands, and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

Minnie Solander a duly enrolled citizen of the Creek Nation died on October 8, 1899. She was survived by her sister Phoebe Trussler, a citizen of the Creek Nation, and by her husband George Solander and by her daughter Hettie Solander who died on December 19, 1899. Hettie Solander was survived by her father George Solander, who was not a citizen of the Creek Nation and was what is known as a non-citizen. Afterwards on March 1, 1901, there was enacted the Creek Agreement (31 Stat. 870), Sec. 28 of which, previously quoted, prevented the death of Minnie Solander from causing the right to an allotment in her name to lapse and either created or continued that right for the benefit of her heirs. She was one who was identified by the act as "living on the first day of April, eighteen hundred ninety-nine" "placed upon the rolls to be made by said Commission" who had "died since that time" "before receiving her allotment of lands." In such case the act said that: "the lands and money to which she would be entitled, if living, shall descend to her heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

It was by authority of this act that the allotment was made to the heirs of Minnie Solander after the death of Minnie Solander and after the death of her child Hettie Solander.

I.

When Minnie Solander died on October 1, 1899, though she was entitled to receive an allotment of Creek tribal lands, none having been selected by or for her, she was seized of no estate, legal or equitable, in the lands of the Creek Nation, and her heirs took nothing at that time by right of inheritance from her.

This conclusion has been reached in a number of cases arising in the Creek Nation.

In the case of *McKee* v. *Henry*, 201 Fed. 74, the United States Circuit Court of Appeals for the Eighth Circuit decided the question. Hugh Warden, a duly enrolled Creek citizen died in November, 1899. Though entitled to an allotment of land no selection was made for him prior to his death. Section 28 of the Original Creek Agreement of March 1, 1901, provided for such a contingency and directed that if such citizen were living on April 1, 1899, and should die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, should descend to his heirs according to the laws of descent and distribution of the Creek Nation and be allotted to them accordingly. No selection was made for him until November 12, 1902. In the meantime on June 30, 1902, the Creek Supplemental Agreement (32 Stat. L. 500), amended sec-

tion 28 of the Original Creek Agreement by providing that the descent should be according to chapter 49 of Mansfield's Digest of the Laws of Arkansas, instead of the Creek law of descent. The court was called upon to decide whether the land descended according to the law in force at the date of the death of Hugh Warden or the law in force at the time of the allotment.

The Circuit Court of Appeals held that when Hugh Warden died he was seized of no inheritable estate in the lands of the Creek Nation and that there was no estate to descend until allotment, which descended according to the law of descent then in force. The court said:

> "When the allotment was made, for the first time the rights of any individual vested, and the title became vested in the one at that time fixed by law, and it makes no difference what previous laws may have provided."

The case of *Brady* v. *Sizemore*, 33 Okla. 169, 124 Pac. 615, appealed to this court, held to the same effect; but in that case while the law of descent at the date of allotment was different from that at the death the heirs were the same.

In the case of *Brann* v. *Bell*, 192 Fed. 427, the United States Circuit Court for the Eastern District of Oklahoma held to the same rule.

In a recent opinion by this court in *Franklin* v. *Lynch*, 233 U. S. 505, the court had under considera-

tion a deed made by Emmer Sisney an intermarried member of the Choctaw Tribe of Indians by which she undertook, on October 16, 1905, before allotment, to convey her "entire interest in any and all lands, exclusive of homestead which might be finally allotted to her by the Commissioners of the Five Civilized Tribes." Though her deed was made after the Act of April 21, 1904 (33 Stat. L. 189), which removed the restrictions on the alienation of lands of allottees of the class to which she belonged, it was held that she had nothing before allotment that she could sell. The court said:

> "As the tribes could not sell, neither could the individual members, *for they had neither an undivided interest in the tribal lands nor vendible interest in any particular tract.*"

Speaking of the act removing restrictions the court said:

> "But it did not permit even a non-citizen to sell *a mere float or expectancy.*"

II.

When the allotment was made to the heirs of Minnie Solander after the death of Minnie Solander and after the death of Hettie Solander the allotment was a direct grant to such heirs who took by purchase and the title vested in the heirs only who were to be identified on the date of the allotment and not on the date of the death of Minnie Solander.

If no title vested in Minnie Solander during her lifetime and none vested in her heirs at her death, as is held by the authorities quoted, of course no right in the land in controversy, allotable to the heirs of Minnie Solander, vested in Hettie Solander the child of Minnie Solander, for though she survived her mother, she too died before the lands in controversy were selected for the heirs of Minnie Solander.

The rule of descent in this case did not operate upon the lands allotted to the heirs of Minnie Solander until the allotment was made. But the Supreme Court of Oklahoma says that while that is true, this law relates back to the death of the Indian entitled to the allotment and identifies the heirs as of that date. It goes back therefore to the date of the death of Minnie Solander and finds surviving, her child, Hettie, and her husband George Solander; treats Hettie Solander as having survived the allotment to receive a half interest in it, the remaining half going to George Solander; treats Hettie So-

lander as if she died seized of this half interest; which thereupon was inherited by her father George Solander who thereby takes the whole allotment.

So far as we can discern this is purely an arbitrary result by no means justified or warranted by the legislation bearing on the subject.

The identical question was decided by the Supreme Court of Kansas in the case of *Brown* v. *Belmarde*, 3 Kan. 35. In that case the Indian Lavonture died in 1847 or 1848. In 1860 a grant of his interest in the reservation was made by the government to his heirs. It was held by the court that the title vested in the persons who would have been the heirs of the deceased Indian had he died on May 26, 1860, the date of the grant, and not those who would have taken if the title had vested at the time he died. The descent was effected at the time of the grant which created the estate.

In that case the Act of Congress of May 26, 1860, was the grant to the individuals and left nothing to be done except to identify the heirs. There was no question as to the date when the title vested and it was held that the vesting of the title and the descent to the heirs, which were synonymous with the identification of the heirs, were simultaneous. The court said:

> "His (Lavonture's) interest did not amount to an estate of inheritance, but was a mere life interest in the usufruct. * * * From that time (the death) to the passage of the Act

of May 26, 1860, the whole title to the lands in controversy was in the government. * * * If we are right in our construction of the 6th article, upon Lavonture's death, there was nothing, so far as section nine was concerned, for such heirs to take.

Had Lavonture been living at the time of the passage of the act, the title would have vested in him; and if he had died the next day, there can be no question that his heirs would have been determined by the law of the state at the time of his death. And it would have made no difference if he had lived for a year and the law of descents been changed in the meantime; the law at the time of his death would have furnished the rule. And why? Not simply because of his death at the particular time, but because that was the time at which the estate would pass. The law at the time the estate passes furnished the rule."

Section 28 of the Creek Agreement is the only authority for making allotments for dead Indians. Without it, on the death of Minnie Solander all rights of expectancy, which she had in the lands of the tribe would have died with her, and her heirs would have taken nothing of the tribal lands because they were her heirs.

So this statute provided for allotting to her heirs the lands to which she "*would be entitled, if living.*" The phrase "would be entitled, if living," is very significant and must be considered. The act does not say that "the lands and money to which she *was* entitled shall descend to her heirs and be

allotted to them." If it did, there would be no doubt that Congress assumed and intended that when the Indian died before allotment he was possessed of an estate in the lands of the tribe that passed then to his heirs identified on the date of his death, who immediately rose up in the place of the dead Indian and became possessed of the right he had.

But Congress did not say that. It interposed a condition which must be observed. Instead of saying that the lands or the right in lands which the Indian *had*, shall descend it said:

> "If any such citizen has died since that time (April 1, 1899) or may hereafter die, before receiving *his allotment of lands* and distributive share of all the funds of the tribe, the lands and money to which he *would be entitled, if living*,"

shall descend and be allotted to the heirs. "If living" when? Obviously "if living" when the allotment was made. It could not refer to any other time. It is certain that the right mentioned in the act was supposed by Congress to accrue at some time after the death. The qualifying words would have been useless otherwise. The meaning is the same as if Congress had said "if such citizen die before receiving his allotment, the lands to which he would be entitled if living when the allotment shall be made, shall descend," etc.

Therefore it seems clear that there was no descendible interest in the land or right of the dead

Indian until the allotment was made to the heirs. These heirs were first known and recognized on the date of the allotment. They were identified as of that date for by the legal fiction stated in the act the Indian was supposed to have survived the allotment and then died. For it was only the lands to which he would have been entitled, "if living," at the date of the allotment, that could descend and be allotted to his heirs.

The allotment to the heirs of Minnie Solander was a direct grant to those heirs from the Creek Nation. The question who were or might have been the heirs of Minnie Solander when she died is immaterial. The inquiry is, Who were the heirs on the date of the allotment? It is true that these heirs took by the right of representation of Minnie Solander, but the court is not to be held to an accurate and technical use of the word "descent" as applied to these lands.

In the case of *Mullen* v. *United States*, 224 U. S. 448, the lands involved were allotted in the name of Choctaw Indians whose names appear upon the roll but who died after the ratification of the agreement and before receiving an allotment. In that case the court said:

> "In both cases the lands were to go immediately to the heirs and the mere circumstances that under the language of the statute the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnishes no reason for implying a

requirement that there should be a designation of a portion of the lands as a homestead."

In the case of *Hall* v. *Russell* (101 U. S. 503) it was stated by this court:

> "It was provided that the possessory rights of a deceased settler should go to his heirs, and that they might get the land on making the requisite proof without further residence and cultivation of their own. Their title to the land was to come, not from their deceased ancestor, but from the United States. The title, it is true, was granted to them by reason of possessive rights of their ancestor, but these were rights which he could not trnsfer, and which passed to them under the statute without any act of his. On his death his heirs became qualified grantees. * * * We attach no importance to the word 'descend' as used in this section. In section four the word selected to convey substantially the same idea was 'entitled.' The thing done was to give the heirs of a settler the benefit of his rights and to designate them as the recipients of the bounty of the government, instead of him."

See also:

Gritts v. *Fisher*, 224 U. S. 640;

Woodbury v. *United States*, 170 Fed. 302.

We believe that the statute when followed by the allotment to the heirs of Minnie Solander created an estate in such heirs which they took by purchase and not by descent. This allotment then was a direct grant to the heirs who were living at the date of the allotment. If that is true the contention of

the defendant in error would enable him to take as allottee in spite of the fact that he is a non-citizen and not entitled under any theory to share in the "final distribution of the lands" of the tribe. The facts and the law make the heirs of Minnie Solander the first takers of this allotment and we cannot escape the conclusion that they are allottees and therefore must be limited to the members of the tribe.

We believe that the inquiry as to who the heirs were to receive this land must be limited to the time of the allotment. Hettie Solander cannot be used as a bridge to span the gap between Minnie Solander a citizen on the one hand and George Solander a non-citizen. Hettie Solander is simply out of the case entirely. She died before the allotment was made and therefore she took nothing. This case should be treated as if she had never lived. Because the heirs are to be identified among those living at the date of the allotment, and these heirs taking by a direct grant from the Creek Nation they must be limited to members of the tribe.

For it is expressly provided in the last paragraph of section 28 of the Creek Agreement, under which this allotment was made, that lands are to be allotted only to persons found on the Creek rolls. This section reads as follows:

> "The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands,

and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

This provision is peculiar to the Creek Agreement and is not found in the Choctaw-Chickasaw Agreement, section 22 of which was under consideration in the case of *Mullen* v. *United States*, 224 U. S. 448.

The husband George Solander, being a non-citizen is disqualified by that test and the only heir therefore who could take was Phoebe Trussler, the full sister of Minnie Solander. As such sole surviving heir she was identified by the allotment "to the heirs of Minnie Solander" and became vested with the whole of said lands.

The Supreme Court of Oklahoma holds that upon the death of Minnie Solander in October, 1899, before allotment, her child would inherit one-half of the allotment, which, by Act of Congress passed some eighteen months subsequent to the death of Minnie Solander, should be allotted and distributed to her heirs and descend to such heirs according to the laws of descent and distribution of the Creek Nation. This notwithstanding the fact that long prior to the passage of this act, which created the estate, the child Hettie Solander died. Upon the death of this child under the doctrine of the Supreme Court of Oklahoma, the father of the child, in this case a non-citizen, would inherit that portion of the mother's land which the court holds was in-

herited by the child. That is, the heir (father) of the heir (daughter) would take this allotment of lands under this construction of the act.

Let us go a step further in this interpretation and see where it leads. Suppose for instance, that this non-citizen father of the heir, died before selection of an allotment under this section authorizing the allotment to the heirs of Minnie Solander, leaving surviving him as his heir, his mother, a non-resident, non-citizen of the Creek Nation. Could we for one moment believe that it was the intention of Congress that this total stranger to the blood of Minnie Solander was intended as the beneficiary of this particular act which declares "the lands and money to which he (she Minnie Solander) would be entitled, if living," shall descend to her heirs and be allotted to them? That this stranger should in this devious way become an allottee of the lands of the Creek Nation?

The logical and reasonable rule is that the heirs are to be identified as if Minnie Solander had survived to receive the lands "to which she would be entitled" at allotment, and then died. The law at the time the estate was created furnishes the rule for indentifying the heirs. The heirs so-called, for the purpose of allotment, are in fact the allottees of the land in controversy. And these allottees must be limited to members of the Creek Tribe.

We believe that consideration of the points briefly referred to herein exposes error in the conclusions reached by the Supreme Court of Oklahoma, and that the judgment of that court should be reversed.

Respectfully submitted,

GRANT FOREMAN,
Amicus Curiæ.

JAMES D. SIMMS,
Of Counsel.

SHELLENBARGER *v.* FEWELL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 103. Argued December 7, 8, 1914.—Decided January 18, 1915.

Reynolds v. *Fewell, ante*, p. 58, followed to the effect that under § 7 of the Original Creek Agreement of 1901 a non-citizen husband is entitled under the tribal laws to take an heir's part of the lands which had been allotted to his deceased citizen wife, pursuant to the rule of property established by the highest court of Oklahoma in *De Graffenreid* v. *Iowa Land & Trust Co.*, 20 Oklahoma, 687.

Quære, whether persons entitled to take lands allotted under § 28 of the Original Creek Agreement on behalf of a deceased member of the tribe should be ascertained by reference to the time of the death of the decedent or by reference to the date of the allotment.

34 Oklahoma, 79, affirmed.

THE facts, which involve the construction of the Original Creek Agreement and the laws of descent applicable to allotments made thereunder, are stated in the opinion.

Mr. William R. Lawrence and *Mr. F. W. Clements* for plaintiff in error.

Mr. Joseph C. Stone, with whom *Mr. Henry B. Martin* was on the brief, for defendant in error.

By leave of court *Mr. Grant Foreman* and *Mr. James D. Simms* filed a brief as *amici curiæ*, in support of plaintiff in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

Minnie Solander, a Creek, died intestate on October 8, 1899, leaving her husband, George Solander (who resided

in the Creek Nation but was not a citizen thereof), her child, Hettie L. Solander, and her sister, Phoebe Trusler, surviving. Hettie L. Solander died intestate on December 19, 1899,[1] without husband or issue; her father and aunt (above mentioned) survived her. Minnie Solander was duly enrolled as a member of the Creek tribe and, after the death of herself and her daughter, an allotment was made to her 'heirs' of certain land, the title to which is here in controversy. Her husband, George Solander, on April 27, 1906, executed a conveyance of this land to William M. Fewell, who brought the present action in ejectment against the plaintiff in error, John H. Shellenbarger; the latter claimed the property under a deed from Phoebe Trusler, the nearest relative of Indian blood.

The Supreme Court of the State of Oklahoma held that the husband, although a non-citizen, had title to the lands allotted on behalf of his wife and that they passed under his conveyance. 34 Oklahoma, 79; 124 Pac. Rep. 617. And this writ of error has been sued out.

The record in this case does not show the date of the allotment made on behalf of Minnie Solander [2] but the state court concluded 'from the admissions in the agreed statement of facts and the briefs of both parties' that the allotment had been selected, and the certificate issued, under the Original Creek Agreement of March 1, 1901, c. 676, 31 Stat. 861. This has also been assumed in the argument here. The case is, therefore, controlled by § 28 of the act of 1901, *supra*, which provides that the lands to which the deceased member of the tribe would have been entitled, if living, should 'descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted . . . accordingly.' Under

[1] The date of her death is given in the agreed statement in No. 102, *Reynolds* v. *Fewell*, *ante*, p. 58, as November 17, 1899.

[2] The date of this allotment is stated in the record in No. 102, *Reynolds* v. *Fewell*, *ante*, p. 58, as December 3, 1901.

these laws, according to the settled rule of construction, George Solander was entitled to the property and had the right to convey. *Reynolds* v. *Fewell*, *ante*, p. 58.

The question whether the persons entitled to take lands allotted under § 28 on behalf of a deceased member of the tribe, should be ascertained by reference to the time of the death of the decedent, or by reference to the date of the allotment, has been discussed in the briefs but is not material here, inasmuch as in either event George Solander took all the lands in question; it is not necessary to inquire whether an undivided interest should be treated as one passing in the first instance to his daughter and on her death to him.

Judgment affirmed.